Nos. 14-556, 14-562 and 14-574

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL.,
PETITIONERS,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,
v.
WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL.,
PETITIONERS,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,
RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX
VOLUME I

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CERTIORARI GRANTED IN ALL CASES JANUARY 16, 2015

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Opinion, United States Court of Appeals for the Sixth Circuit, November 6, 2014 . .. 1a-106a

Order, United States District Court for the Southern District of Ohio, April 14, 2014 ..... 107a-160a

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The following constitutional and statutory provisions have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to Petition for a Writ of Certiorari in *Tanco* v. *Haslam*, No. 14-562:

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The following opinion and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the printed Joint Petition for a Writ of Certiorari in *Bourke v. Beshear* and *Love v. Beshear*, No. 14-574:

Opinion, United States Court of Appeals for the Sixth Circuit, November 6, 2014 ..... 1a-95a

Memorandum Opinion and Order, United States District Court for the Western District of Kentucky, July 1, 2014 ..... 96a-123a

Memorandum Opinion, United States District Court for the Western District of Kentucky, February 12, 2014 ..... 124a-157a

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U.S. DISTRICT COURT, SOUTHERN DISTRICT OF OHIO

Civil Docket For Case #: 1:13-cv-00501-TSB

OBERGEFELL, ET AL.,

v.

KASICH, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
07/19/2013	COMPLAINT against All Defendants (Filing fee $ 400 paid - receipt number: 0648-4186919), filed by James Obergefell, John Arthur. (Attachments: # 1 Civil Cover Sheet) (Branch, Jennifer) (Entered: 07/19/2013)
07/19/2013	MOTION for Temporary Restraining Order *and Preliminary Injunction* by Plaintiffs John Arthur, James Obergefell. (Attachments: # 1 Affidavit Declaration of James Obergefell, # 2 Affidavit Declaration of John Arthur, # 3 Text of Proposed Order) (Gerhardstein, Alphonse) (Entered: 07/19/2013)
07/22/2013	RESPONSE to Motion re 3 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Defendant Camille Jones. (Attachments:

DATE	PROCEEDINGS
	# 1 Exhibit A) (Herzig, Aaron) (Entered: 07/22/2013)
07/22/2013	RESPONSE in Opposition re 3 MOTION for Temporary Restraining Order *and Preliminary Injunction* filed by Defendants Mike DeWine, John Kasich. (Attachments: # 1 Exhibit A Blank Certificate of Death) (Coontz, Bridget) (Entered: 07/22/2013)
07/22/2013	NOTICE by Plaintiffs John Arthur, James Obergefell re 3 MOTION for Temporary Restraining Order *and Preliminary Injunction of Filing Revised Proposed TRO* (Branch, Jennifer) (Entered: 07/22/2013)
07/22/2013	ORDER GRANTING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER (Doc. 3). Signed by Judge Timothy S. Black on 7/22/2013. (mr1) (Entered: 07/22/2013)
07/22/2013	TEMPORARY RESTRAINING ORDER. Signed by Judge Timothy S. Black on 7/22/2013. (mr1) (Entered: 07/22/2013)
07/22/2013	Minute Entry: This civil action came before the Court for a hearing on Plaintiffs' Motion for Temporary Restraining Order (Doc. 3) on 7/22/13 at 1:30 p.m. Attorneys Alphonse Gerhardstein, Jennifer Branch, and Jacklyn Martin appeared for Plaintiffs, along with Plaintiff James Obergefell. Attorneys Bridget Coontz and

DATE	PROCEEDINGS
	Kristopher Armstrong appeared for Defendants Kasich and DeWine. Attorney Aaron Herzig appeared for Defendant Jones. Mr. Obergefell provided sworn testimony. (Court Reporter Jodie Perkins (Official).) (mr1) (Entered: 07/22/2013)
07/30/2013	Minute Entry, NOTATION ORDER, and NOTICE of Telephone Conference: This civil action came on before the Court for a status conference by telephone on 7/30/13 at 8:30 a.m. Attorneys Alphonse Gerhardstein, Jennifer Branch, Jacklyn Martin, Bridget Coontz, and Aaron Herzig participated. Pursuant to Rule 65(b)(2) of the Federal Rules of Civil Procedure, and by agreement of the parties, the expiration of the temporary restraining order (Doc. 14) is hereby extended to 8/19/13 at 5:00 p.m., in order to facilitate the parties' further negotiations of a proposed litigation calendar for resolution. A separate Order of extension shall issue. A status conference by telephone is set for 8/13/13 at 11:00 a.m. before Judge Timothy S. Black. COUNSEL SHALL CALL 1-888-684-8852; Access code: 8411435; Security code: 123456, and wait for the Court to join the conference. IT IS SO ORDERED. (Court Reporter Jodie Perkins (Official).) (mr1) (Entered: 07/30/2013)

DATE	PROCEEDINGS
07/30/2013	EXTENSION OF TEMPORARY RESTRAINING ORDER. Signed by Judge Timothy S. Black on 7/30/2013. (mr1) (Entered: 07/30/2013)
08/13/2013	ORDER OF EXTENSION OF THE TEMPORARY RESTRAINING ORDER. Signed by Judge Timothy S. Black on 8/13/2013. (mr1) (Entered: 08/13/2013)
09/03/2013	MOTION for Temporary Restraining Order *re David Michener* by Plaintiffs John Arthur, James Obergefell. (Attachments: # 1 Exhibit Michener TRO) (Gerhardstein, Alphonse) (Entered: 09/03/2013)
09/03/2013	TEMPORARY RESTRAINING ORDER as per David Michener. Signed by Judge Timothy S. Black on 9/3/2013. (mr1) (Entered: 09/03/2013)
09/26/2013	AMENDED COMPLAINT *(Second)* against Camille Jones, Theodore Wymyslo, M.D., filed by James Obergefell, David Brian Michener, John Arthur, Robert Grunn. (Gerhardstein, Alphonse) (Entered: 09/26/2013)
10/08/2013	DECLARATION of Robert Grunn filed in Support of Amended Complaint 33 by Plaintiffs John Arthur, Robert Grunn, David Brian Michener, James Obergefell (Attachments: # 1 Affidavit of Robert Grunn) (Gerhardstein, Alphonse) Modified to clarify text and

DATE	PROCEEDINGS
	create link on 10/9/2013 (tt). (Entered: 10/08/2013)
10/11/2013	ANSWER to 33 Amended Complaint filed by Camille Jones. (Herzig, Aaron) (Entered: 10/11/2013)
10/11/2013	ANSWER to 33 Amended Complaint filed by Theodore Wymyslo, M.D. (Coontz, Bridget) (Entered: 10/11/2013)
10/11/2013	NOTICE by Plaintiffs John Arthur, Robert Grunn, David Brian Michener, James Obergefell *of Filing Expert Report of Susan J. Becker* (Attachments: # 1 Expert Declaration, # 2 Exhibit Becker Exhibit A, # 3 Exhibit Becker Exhibit B, # 4 Exhibit Becker Exhibit C, # 5 Exhibit Becker Exhibit D, # 6 Exhibit Becker Exhibit E, # 7 Exhibit Becker Exhibit F, # 8 Exhibit Becker Exhibit G, # 9 Exhibit Becker Exhibit H, # 10 Exhibit Becker Exhibit I, # 11 Exhibit Becker Exhibit J, # 12 Exhibit Becker Exhibit K, # 13 Exhibit Becker Exhibit L, # 14 Exhibit Becker Exhibit M, # 15 Exhibit Becker Exhibit N, # 16 Exhibit Becker Exhibit O, # 17 Exhibit Becker Exhibit P, # 18 Exhibit Becker Exhibit Q) (Martin, Jacklyn) (Entered: 10/11/2013)
10/11/2013	NOTICE by Plaintiffs John Arthur, Robert Grunn, David Brian Michener, James Obergefell *of Filing Expert*

DATE	PROCEEDINGS
	Report of George Chauncey (Attachments: # 1 Expert Declaration, # 2 Exhibit Exhibit A, Chauncey CV, # 3 Exhibit Exhibit B, Chauncey Bibliography) (Martin, Jacklyn) (Entered: 10/11/2013)
10/11/2013	NOTICE by Plaintiffs John Arthur, Robert Grunn, David Brian Michener, James Obergefell *of Filing Expert Report of Megan Fulcher* (Attachments: # 1 Expert Declaration) (Martin, Jacklyn) (Entered: 10/11/2013)
10/11/2013	NOTICE by Plaintiffs John Arthur, Robert Grunn, David Brian Michener, James Obergefell *of Filing Expert Report of Joanna L. Grossman* (Attachments: # 1 Expert Declaration, # 2 Exhibit A-Grossman CV, # 3 Exhibit B, Family Law Columns, # 4 Grossman Bibliography) (Martin, Jacklyn) (Entered: 10/11/2013)
10/11/2013	NOTICE by Plaintiffs John Arthur, Robert Grunn, David Brian Michener, James Obergefell *of Filing Expert Report of Bernard L. McKay* (Attachments: # 1 Expert Declaration) (Martin, Jacklyn) (Entered: 10/11/2013)
10/11/2013	NOTICE by Plaintiffs John Arthur, Robert Grunn, David Brian Michener, James Obergefell *of Filing Expert Report of Letitia Anne Peplau* (Attachments: # 1 Expert Declaration,

DATE	PROCEEDINGS
	# 2 Exhibit A, Peplau CV, # 3 Exhibit B, Peplau Bibliography) (Martin, Jacklyn) (Entered: 10/11/2013)
10/11/2013	NOTICE by Plaintiffs John Arthur, Robert Grunn, David Brian Michener, James Obergefell *of Filing Expert Report of Gary M. Segura* (Attachments: # 1 Expert Declaration, # 2 Exhibit A, Segura CV, # 3 Exhibit B, Segura Sources) (Martin, Jacklyn) (Entered: 10/11/2013)
10/14/2013	NOTICE by Plaintiffs John Arthur, Robert Grunn, David Brian Michener, James Obergefell *of filing Declaration of James Obergefell re Funeral Director* (Attachments: # 1 Affidavit of James Obergefell re Funeral Director) (Gerhardstein, Alphonse) (Entered: 10/14/2013)
10/22/2013	NOTICE by Plaintiffs John Arthur, Robert Grunn, David Brian Michener, James Obergefell *of Death of Plaintiff John Arthur* (Gerhardstein, Alphonse) (Entered: 10/22/2013)
10/29/2013	NOTICE by Plaintiffs Robert Grunn, David Brian Michener, James Obergefell *of Compliance with Court Orders* (Attachments: # 1 Exhibit A, Certificate of Death, John Arthur, # 2 Exhibit B, Certificate of Death, William Herbert Ives) (Gerhardstein, Alphonse) (Additional attachment(s)

DATE	PROCEEDINGS
	added on 11/1/2013: # 3 Exhibit A) (mr1). (Additional attachment(s) added on 11/1/2013: # 4 Exhibit B) (mr1). Modified to remove unredacted death certificates and upload redacted death certificates and regenerate NEF on 11/1/2013 (mr1). (Entered: 10/29/2013)
10/29/2013	MOTION for Permanent Injunction *and Declaratory Judgment* by Plaintiffs Robert Grunn, David Brian Michener, James Obergefell. Responses due by 11/18/2013 (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order) (Gerhardstein, Alphonse) (Entered: 10/29/2013)
11/15/2013	*Supplemental* ANSWER to 33 Amended Complaint filed by Theodore Wymyslo, M.D.. (Coontz, Bridget) (Entered: 11/15/2013)
11/18/2013	RESPONSE in Opposition re 53 MOTION for Permanent Injunction *and Declaratory Judgment* filed by Defendant Theodore Wymyslo, M.D. (Coontz, Bridget) (Entered: 11/18/2013)
11/25/2013	BRIEF re 60 Unopposed MOTION for Leave to File *Brief of Amicus Curiae* by Amicus Citizens for Community Values. (La Rue, Joseph) (Entered: 11/25/2013)
12/09/2013	REPLY to Response to Motion re 53 MOTION for Permanent Injunction

DATE	PROCEEDINGS
11/06/2014	OPINION and JUDGMENT filed: The judgment of the district court is REVERSED. Decision for publication. Martha Craig Daughtrey (DISSENTING), Jeffrey S. Sutton (AUTHORING) and Deborah L. Cook, Circuit Judges. [14-3057, 14-3464] (CL)
11/20/2014	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee James Obergefell in 14-3057. Supreme Court Case No:14-556, 11/14/2014. [14-3057, 14-3464] (CL)

U.S COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals Docket #: 14-3464

HENRY, ET AL.,

v.

HODGES, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
05/12/2014	Civil Case Docketed. Notice filed by Appellant Mr. Lance D. Himes. Transcript needed: y. (CB)
05/20/2014	ORDER filed to consolidate for submission the following cases: 14-3057/3464. [14-3057, 14-3464] (CB)
06/10/2014	APPELLANT BRIEF filed by Mr. Eric E. Murphy for Mr. Lance D. Himes. Certificate of Service:06/10/2014. Argument Request: requested. (EEM)
07/08/2014	APPELLEE BRIEF filed by Mr. Alphonse A. Gerhardstein for Brittani Henry, Brittni Rogers, Georgia Nicole Yorksmith, Pamela Yorksmith, Kelly Noe, Kelly McCracken, Joseph J. Vitale, Robert Talmas and Adoption S.T.A.R., Inc.. Certificate of Service: 07/08/2014. Argument Request: requested. (AAG)

DATE	PROCEEDINGS
07/15/2014	REPLY BRIEF filed by Attorney Mr. Eric E. Murphy for Appellant Mr. Lance D. Himes. Certificate of Service: 07/15/2014. (EEM)
08/06/2014	CAUSE ARGUED by Mr. Eric E. Murphy for Appellant Mr. Lance D. Himes in 14-3057 & 14-3464, by Mr. Alphonse A. Gerhardstein for Appellees James Obergefell, John Arthur, David Brian Michener and Robert Grunn in 14-3057, Appellees Brittani Henry, Brittni Rogers, Georgia Nicole Yorksmith, Pamela Yorksmith, Kelly Noe, Kelly McCracken, Joseph J. Vitale, Robert Talmas and Adoption S.T.A.R., Inc. in 14-3464, before Daughtrey, Circuit Judge; Sutton, Circuit Judge and Cook, Circuit Judge. [14-3057, 14-3464] (MCP)
11/06/2014	ORDER filed for substitution of Richard Hodges for Lance D. Himes, Interim Director of the Ohio Department of Health. [14-3057, 14-3464] *The order has been corrected to reflect that Richard Hodges is the current [not interim director] of the Ohio Department of Health.–[Edited 11/06/2014 by CL] (CL)
11/06/2014	OPINION and JUDGMENT filed: The judgment of the district court is REVERSED. Decision for publication.

DATE	PROCEEDINGS
	and Declaratory Judgment filed by Plaintiffs Robert Grunn, David Brian Michener, James Obergefell. (Attachments: # 1 Exhibit A-Whitewood Order, # 2 Exhibit B-Excerpt of Perry Trial Transcript) (Gerhardstein, Alphonse) (Entered: 12/09/2013)
12/18/2013	Minute entry: This civil action came before the Court on oral argument re: Motion for Permanent Injunction and Declaratory Judgment (Doc. 53) on 12/18/2013 at 10:00 a.m. Attorneys Al Gerhardstein, Jacklyn Martin, Lisa Meeks and Jennifer Branch appeared with Plaintiffs James Obergefell, David Michener and Robert Grunn. Attorneys Bridget Coontz, Zachery Keller and Ryan Richard appeared on behalf of the State of Ohio Defendants. Attorney Aaron Herzig appeared on behalf of the City of Cincinnati Defendants. Arguments were heard. (Court Reporter Jodie Perkins (Official).) (mr1) (Entered: 12/18/2013)
12/20/2013	NOTICE by Plaintiffs Robert Grunn, David Brian Michener, James Obergefell *of Supplemental Authority* (Attachments: # 1 Kitchen v. Herbert-Supplemental Authority) (Gerhardstein, Alphonse) (Entered: 12/20/2013)

DATE	PROCEEDINGS
12/23/2013	FINAL ORDER GRANTING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION. Signed by Judge Timothy S. Black on 12/23/2013. (mr1) (Entered: 12/23/2013)
12/23/2013	DECLARATORY JUDGMENT AND PERMANENT INJUNCTION. Signed by Judge Timothy S. Black on 12/23/2013. (mr1) (Entered: 12/23/2013)
01/16/2014	NOTICE OF APPEAL by Defendant Theodore Wymyslo, M.D. Filing fee $ 505. (Coontz, Bridget) (Entered: 01/16/2014)

U.S. DISTRICT COURT, SOUTHERN DISTRICT OF OHIO

Civil Docket For Case #: 1:14-cv-00129-TSB

HENRY, ET AL.,

v.

HIMES, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
02/10/2014	COMPLAINT against All Defendants (Filing fee $ 400 paid – receipt number: 0648-4439792), filed by Kelly McCracken, Georgia Nicole Yorksmith, Robert Talmas, Brittni Rogers, Joseph J. Vitale, Pamela Yorksmith, Brittani Henry, Adoption S.T.A.R., Inc., Kelly Noe. (Attachments: # 1 Civil Cover Sheet) (Branch, Jennifer) Modified to correct docket text on 2/11/2014 (sct1). (Entered: 02/10/2014)
02/10/2014	MOTION for Temporary Restraining Order *and Preliminary Injunction* by Plaintiffs Adoption S.T.A.R., Inc., Brittani Henry, Kelly McCracken, Kelly Noe, Brittni Rogers, Robert Talmas, Joseph J. Vitale, Georgia Nicole Yorksmith, Pamela Yorksmith. (Attachments: # 1 Exhibit 1 Proposed Order on Motion on TRO, # 2 Affidavit

DATE	PROCEEDINGS
	Brittni Rogers Signed Declaration, # 3 Affidavit Yorksmith Signed Declaration, # 4 Affidavit Noe Signed Declaration, # 5 Affidavit Vitale Signed Declaration, # 6 Affidavit Ginn Signed Declaration, # 7 Affidavit Singer Signed Declaration, # 8 Affidavit Seay Signed Declaration) (Gerhardstein, Alphonse). Added MOTION for Preliminary Injunction on 2/10/2014 (sct1). Modified to correct docket text on 2/11/2014 (sct1). (Entered: 02/10/2014)
02/25/2014	ANSWER to 1 Complaint, filed by Theodore E. Wymyslo. (Richardson, Ryan) (Entered: 02/25/2014)
02/28/2014	NOTICE *of Filing Declaration of Alphonse A. Gerhardstein* by Plaintiffs Adoption S.T.A.R., Inc., Brittani Henry, Kelly McCracken, Kelly Noe, Brittni Rogers, Robert Talmas, Joseph J. Vitale, Georgia Nicole Yorksmith, Pamela Yorksmith (Attachments: # 1 Declaration of Alphonse A. Gerhardstein, # 2 Ex. A-Redacted Order of Adoption, # 3 Ex. B-Becker Declaration, # 4 Ex. C-Chauncey Declaration, # 5 Ex. D-Fulcher Declaration, # 6 Ex. E-Grossman Declaration, # 7 Ex. F-McKay Declaration, # 8 Ex. G-Peplau Declaration, # 9 Ex. H-Segura Declaration) (Gerhardstein, Alphonse)

DATE	PROCEEDINGS
	Modified on 2/28/2014 (mr1). (Entered: 02/28/2014)
02/28/2014	MOTION for Permanent Injunction *and Declaratory Judgment* by Plaintiffs Adoption S.T.A.R., Inc., Brittani Henry, Kelly McCracken, Kelly Noe, Brittni Rogers, Robert Talmas, Joseph J. Vitale, Georgia Nicole Yorksmith, Pamela Yorksmith. Responses due by 3/19/2014 (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order) (Gerhardstein, Alphonse) (Entered: 02/28/2014)
02/28/2014	STIPULATIONS *(s) by All Parties* by Plaintiffs Adoption S.T.A.R., Inc., Brittani Henry, Kelly McCracken, Kelly Noe, Brittni Rogers, Robert Talmas, Joseph J. Vitale, Georgia Nicole Yorksmith, Pamela Yorksmith, Defendants Theodore Wymyslo, Camille Jones. (Attachments: # 1 A-1 Worksheet, # 2 A-2 Flow Sheet, # 3 A-3 Flow Sheet, # 4 A-4 Sample Record) (Gerhardstein, Alphonse) Modified to include all filers on 3/3/2014 (eh1). (Entered: 02/28/2014)
03/19/2014	RESPONSE in Opposition re 18 MOTION for Permanent Injunction *and Declaratory Judgment* filed by Defendant Theodore E. Wymyslo. (Richardson, Ryan) (Entered: 03/19/2014)

DATE	PROCEEDINGS
03/20/2014	NOTATION ORDER: Given the parties' agreement to proceed directly to final disposition of this action, Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction (Doc. 4) is hereby TERMINATED as MOOT. IT IS SO ORDERED by Judge Timothy S. Black on 3/20/2014. (mr1) (Entered: 03/20/2014)
04/01/2014	REPLY to Response to Motion re 18 MOTION for Permanent Injunction *and Declaratory Judgment* filed by Plaintiffs Adoption S.T.A.R., Inc., Brittani Henry, Kelly McCracken, Kelly Noe, Brittni Rogers, Robert Talmas, Joseph J. Vitale, Georgia Nicole Yorksmith, Pamela Yorksmith. (Attachments: # 1 Exhibit A. Chart of Harm Suffered by Plaintiffs, # 2 Exhibit B. Unpublished Case) (Gerhardstein, Alphonse) (Entered: 04/01/2014)
04/03/2014	NOTICE by Defendant Theodore E. Wymyslo *Substitution of Party* (Richardson, Ryan) (Entered: 04/03/2014)
04/04/2014	Minute entry: This civil action came on before the Court on oral argument on Plaintiffs' Motion for Permanent Injunction and Declaratory Judgment (Doc. 18) on 4/4/2014 at 10:00 a.m. Attorneys Al Gerhardstein, Susan Sommer, Ellen Essig, Lisa Meeks, and

DATE	PROCEEDINGS
	Adam Gerhardstein appeared with Plaintiffs Brittani Henry, Brittni Rogers, Georgia Nicole Yorksmith, Pamela Yorksmith, Kelly Noe, Kelly McCracken, Joseph Vitale, and Robert Talmas. Attorneys Ryan Richardson, Bridget Coontz, and Zachery Keller appeared on behalf of Defendant Wymyslo. Attorney Peter Stackpole appeared on behalf of Defendant Jones. Arguments were presented to the Court. A written decision will issue on or before 4/14/14. The Court anticipates striking down as unconstitutional under all circumstances Ohio's bans on recognizing legal same-sex marriages from other states. (Court Reporter Jodie Perkins (Official).) (mr1) (Entered: 04/04/2014)
04/14/2014	ORDER GRANTING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION. Signed by Judge Timothy S. Black on 4/14/2014. (mr1) (Entered: 04/14/2014)
04/14/2014	DECLARATORY JUDGMENT AND PERMANENT INJUNCTION affirming ORDER GRANTING PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION 28 . Signed by Judge Timothy S. Black on 4/14/2014. (mr1) (Entered: 04/14/2014)

U.S COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals Docket #: 14-3057

OBERGEFELL, ET AL.,

v.

HODGES, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
01/22/2014	Civil Case Docketed. Notice filed by Appellant Theodore Wymyslo, MD. Transcript needed: y. (CB)
04/10/2014	APPELLANT BRIEF filed by Ms. Bridget Carty Coontz for Theodore Wymyslo, MD. Certificate of Service: 04/10/2014. Argument Request: requested. (BCC)
04/15/2014	ORDER filed substituting Interim Director of the Ohio Dept. of Health Lance D. Himes for Theodore Wymyslo as appellant pursuant to FRAP Rule 43 (c)(2). (CB)
04/24/2014	APPELLEE BRIEF filed by Ms. Jennifer L. Branch for James Obergefell, John Arthur, David Brian Michener and Robert Grunn. Certificate of Service: 04/24/2014. Argument Request: requested. (JLB)

DATE	PROCEEDINGS
05/12/2014	REPLY BRIEF filed by Attorney Ms. Bridget Carty Coontz for Appellant Mr. Lance D. Himes. Certificate of Service: 05/12/2014. (BCC)
05/20/2014	ORDER filed to consolidate for submission the following cases: 14-3057/3464. [14-3057, 14-3464] (CB)
08/06/2014	CAUSE ARGUED by Mr. Eric E. Murphy for Appellant Mr. Lance D. Himes in 14-3057 & 14-3464, by Mr. Alphonse A. Gerhardstein for Appellees James Obergefell, John Arthur, David Brian Michener and Robert Grunn in 14-3057, Appellees Brittani Henry, Brittni Rogers, Georgia Nicole Yorksmith, Pamela Yorksmith, Kelly Noe, Kelly McCracken, Joseph J. Vitale, Robert Talmas and Adoption S.T.A.R., Inc. in 14-3464, before Daughtrey, Circuit Judge; Sutton, Circuit Judge and Cook, Circuit Judge. [14-3057, 14-3464] (MCP)
11/06/2014	ORDER filed for substitution of Richard Hodges for Lance D. Himes, Interim Director of the Ohio Department of Health. [14-3057, 14-3464] *The order has been corrected to reflect that Richard Hodges is the current [not interim director] of the Ohio Department of Health.–[Edited 11/06/2014 by CL] (CL)

DATE	PROCEEDINGS
04/16/2014	ORDER GRANTING IN PART DEFENDANT HIMES'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL. Signed by Judge Timothy S. Black on 4/16/2014. (mr1) (Entered: 04/16/2014)
05/09/2014	NOTICE OF APPEAL as to 29 Judgment, Permanent Injunction, 28 Order on Motion for Permanent Injunction by Defendant Lance Himes. Filing fee $ 505, receipt number 0648-4558764. (Richardson, Ryan) (Entered: 05/09/2014)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 07/19/13]

Case No.

JAMES OBERGEFELL AND JOHN ARTHUR,

Plaintiffs,

vs.

JOHN KASICH, ET AL.,

Defendants.

Judge

DECLARATION OF JAMES OBERGEFELL

I, James Obergefell, under 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following is true and correct:

1. My name is James Obergefell and I am a plaintiff in the above action. I have read the complaint filed in this action and I can verify that all of the facts are true. I submit this declaration in support of our request for a preliminary injunction.

2. I am 47 years old. I grew up in Sandusky, Ohio and graduated from the University of Cincinnati with a bachelor's degree in secondary education 1990.

3. I met John Arthur in Cincinnati in 1992. We have been in a loving, committed relationship since that time.

4. For many years we have both worked in the same field providing information technology consulting services. We pay our taxes, vote and care about our community.

5. Cincinnati is our home. John and I have developed many close friends in Cincinnati and we have many family members in this area and throughout Ohio. I have 10 nieces and nephews and five great nieces and nephews. Many are still children and we are very close to many of them.

6. We were honored and very moved when close friends, an opposite-sex married couple from Cincinnati, designated us to raise their child should they pass away while their child is still a minor. If we should have to serve we would want the child to accept us as parents with the full dignity allowed any family. We do not want to be viewed as a second-tier family.

7. We love the arts and building community. We have hosted foreign exchange students in our home; we have served as members of the Mount Washington Community Council Pendleton Neighborhood Council and as members and officers of the North Avondale neighborhood Association. We have helped raise money for the Cincinnati Symphony and the Cincinnati Preservation Association and served as volunteers for Artworks and the Cincinnati Preservation Association.

8. We also love renovating and decorating homes and traveling. We have renovated and resided in homes in Mt. Washington, North Avondale, Pendleton, and Over the Rhine.

9. In 2011, John was diagnosed with amyotrophic lateral sclerosis (ALS). Since then his muscles have steadily deteriorated. There is no cure. He will die soon.

10. On June 26, 2013, the Supreme Court decided the historic case of *United States v. Windsor,* which says that the federal government must recognize the marriages of same-sex couples who are married in the growing number of states where same-sex marriage is legal.

11. We were thrilled by the U.S. Supreme Court decision. We had been frustrated for many years by the fact that Ohio does not permit same-sex couples to marry. This decision partially opened the door toward equality.

12. On July 11, 2013, through the loving efforts of our friends and family we were able to fly on a medically equipped airplane to Maryland. While our plane sat on the tarmac at the Baltimore airport in Anne Arundel County, Maryland, we were married inside the plane in a ceremony officiated by John's aunt, Paulette Roberts.

13. We are now legally married under Maryland law. But in Ohio our marriage means nothing. Ohio does not recognize our marriage.

14. Why does this matter? We live as a married couple, we will support each other and care for each other until one of us dies. There are many tax and other benefits that our opposite-sex

married friends have that we do not have because we cannot marry.

15. But this is about more than money or benefits. John will die soon. I love him deeply; more than any other person on earth. I want the world to know that we share the highest commitment two people can make to each other in our society. I recently reviewed a blank death certificate. When John dies he should be listed as married on that document and I should be listed as his surviving spouse. This is the last official record of his life. It breaks my heart to think that this record would omit the most important fact of his life—our marriage.

16. Recognizing our marriage and accurately completing John's death certificate will put us on an equal footing with opposite-sex couples in Ohio who are married outside of Ohio; accurately guide our legacy as a married couple through genealogical studies which rely on death certificates; properly record vital statistics about our marriage in Cincinnati; help me apply for any benefits to which I may be entitled as a surviving spouse; help us file joint federal, Ohio, and Cincinnati tax returns for this year; and properly say to our community for eternity that this man was my husband and have the government respond by saying yes, we agree and we support you.

17. Our legacy as a married couple is very important to John and to me. Our present family and friends know we are committed to each other. But in two or more generations our descendants will not know who we are, Married couples, often

For the Defendant Kasich:	Bridget C. Coontz, ESQ. Kristopher Armstrong, ESQ. Ohio Attorney General's Office Constitutional Offices 30 East Broad Street, 16th Floor Columbus, OH 43215
For the Defendant Jones:	Aaron M. Herzig, ESQ. City of Cincinnati Law Department 801 Plum Street, Room 214 Cincinnati, OH 45202

Court Reporter: Jodie D. Perkins, RMR, CRR

* * * *

[16] If you're ready, I am prepared to hear testimony.

MR. GERHARDSTEIN: Plaintiff calls Mr. James Obergefell.

THE COURT: If the gentleman would be willing to approach.

(Witness complied.)

THE COURT: And as you arrive, if you would pause and raise your right hand for the oath to tell the truth.

JAMES OBERGEFELL

being first duly sworn, was examined and testified as follows:

[17] THE COURT: Good afternoon.

THE WITNESS: Hello.

THE COURT: You may proceed, Counsel.

DIRECT EXAMINATION

BY MR. GERHARDSTEIN:

Q. State your full name, please.

A. James Obergefell.

Q. And do you reside in Cincinnati?

A. I do.

Q. Are you married?

A. Yes, I am.

Q. To whom are you married?

A. John Arthur.

Q. Where did you get married?

A. Glen Burnie, Maryland.

Q. And when did you get married?

A. July 11th, 2013.

Q. I'm going to show you what's been previously marked as Plaintiff's Exhibit 1. Do you have an exhibit pile in front of you there?

A. I do.

Q. Thank you. Can you tell me what that is?

A. That is our certified marriage license from the state of Maryland, Anne Arundel County.

[18] Q. And that reflects that under Maryland law you were duly married and your marriage is recognized under Maryland law?

A. Yes, it does.

Q. So you are married to John Arthur, right?

A. Correct.

Q. You've read the complaint that was filed in this case, right?

A. I did.

Q. Are the facts in the complaint accurate and true?

A. Yes, they are.

Q. You and John both filed declarations in support of the motion for a temporary restraining order, right?

A. Correct, we did.

Q. Are the facts stated in your declaration true and accurate?

A. Yes.

Q. Now, because we've done that work already and we're here on a temporary restraining order, I'm not going to ask you to repeat everything in the declaration. But I would like you to tell the Court, just briefly, how long you and John have been together and what the relationship has meant to the two of you.

A. We've been together since December 31st, 1992, and it's been my world. It's been my life. We've been committed in a committed relationship since that time. And, in our eyes, we are married. Our families love us. Our families consider us married. Our families and friends treat us as a committed [19] married couple.

Q. Now you've been a couple and lived together for 20 years. Why is it so important to be married?

A. Well, I think that's the same for any couple who decides to get married, no matter how long they've been together. We want our country, our state, to recognize our relationship and to say yes, you matter, you were married; you have the rights, the benefits and the responsibilities that go with that, just as any

other couple. With John near death, it was very important to us to have our relationship formalized and recognized by our government.

Q. Now, some of those benefits are economic, like the right to file a joint tax return, right?

A. Correct.

Q. But what brings you in to court today is something more urgent, right?

A. Yes.

Q. By the way, has the City of Cincinnati done anything symbolic to recognize you as a couple and to recognize your marriage?

A. They have. They have proclaimed July 11th, 2013, John Arthur and Jim Obergefell Day, in honor of our marriage.

Q. And is a copy of that proclamation signed by Mayor Mallory present in the record as Plaintiffs' Exhibit 2?

A. It is.

[20] Q. John is not with you here today in the courtroom?

A. No, he is not.

Q. Why is that?

A. John was diagnosed with ALS two years ago, and he is now confined to bed unable to go anywhere without proper medical assistance.

Q. You signed his declaration using a Power of Attorney?

A. Yes, I did.

DATE	PROCEEDINGS
	Martha Craig Daughtrey (DISSENTING), Jeffrey S. Sutton (AUTHORING) and Deborah L. Cook, Circuit Judges. [14-3057, 14-3464] (CL)
11/20/2014	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee James Obergefell in 14-3057. Supreme Court Case No:14-556, 11/14/2014. [14-3057, 14-3464] (CL)

through research based on death records, have recognition for their special status forever. I want my descendants generations from now who research their history to learn that I loved and married John and that he loved and married me. They will know that they had a gay ancestor who was proud and strong and in love.

18. Many opposite-sex couples are married elsewhere under circumstances that would not permit them to marry if they were in Ohio. But when they move to Ohio their marriages are nonetheless treated as valid. We deserve the benefits and privileges of marriage as much as the opposite-sex couples who are married elsewhere and who would not otherwise be entitled to marry in Ohio.

19. John and I do not have much time left together. John is drawing tremendous energy from the thought that we could possibly have our Maryland marriage recognized as valid in Ohio before he dies. I ask the court to act quickly. If we can do that John will truly rest in peace.

Dated: 7/19/2013

/s/ James Obergefell
James Obergefell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 07/19/13]

Case No.

JAMES OBERGEFELL AND JOHN ARTHUR,

Plaintiffs,

vs.

JOHN KASICH, ET AL,

Defendants.

Judge

DECLARATION OF JOHN ARTHUR

I, John Arthur, under 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following is true and correct:

1. My name is John Arthur and I am a plaintiff in the above action. I have read the complaint filed in this action and I can verify that all of the facts are true. I submit this declaration in support of our request for a preliminary injunction.

2. I was born in Chicago but have lived in Cincinnati since the age of seven. I graduated from the University of Cincinnati with a bachelor's degree in business administration in 1988.

3. My parents were born in and grew up in the Greater Cincinnati area. My only brother still owns property in Cincinnati to make it easier for him to visit James and me. I have aunts, uncles and cousins in the Greater Cincinnati area.

4. I have been considered a part of James' family for more than 20 years, expanding my family to include five more siblings, 10 nieces and nephews, and five great nieces and nephews.

5. My social network and support system is centered in Cincinnati, Ohio and stretches throughout Ohio (Sandusky, Toledo, Columbus, etc) and beyond.

6. As advocates for the city of Cincinnati through membership and participation in three neighborhood associations, public school input sessions, neighborhood planning, The Cincinnati Master Plan, and more; we have been fully-committed and productive members of our community and the State of Ohio. We give not only through our tax dollars but through donations, memberships and civic involvement.

7. I am 47 years old. I am suffering from ALS and am a hospice patient. I am very weak and confined to my bed.

8. I am married to James Obergefell. I love him and want our last days together to be a celebration of our love. How can we celebrate when Ohio law requires that my death certificate say I am not married and that I have no surviving spouse? We also deserve all the economic benefits that come from recognizing our marriage.

9. Only through court action to recognize our marriage in Ohio can James and I receive the dignity that our marriage deserves. Please act soon.

Dated: 7/19/2013

/s/ John Arthur
John Arthur

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:13cv501

JAMES OBERGEFELL, ET AL.,

Plaintiffs,

v.

JOHN KASICH,

Defendants

Cincinnati, Ohio
Monday, July 22, 2013 1:33 p.m.

MOTION FOR TEMPORARY
RESTRAINING ORDER

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE TIMOTHY S. BLACK, JUDGE

APPEARANCES:

For the Plaintiffs: Alphonse A. Gerhardstein, Esq.
Jennifer L. Branch, ESQ.
Jacklyn Gonzales Martin, ESQ.
Gerhardstein & Branch Co. LPA
432 Walnut Street, Suite 400
Cincinnati, OH 45202

Q. Was he fully engaged in the preparation of that declaration and did he help draft it? Did he review it?

A. Absolutely. He helped draft it. He reviewed it and gave his approval.

Q. And I don't want to belabor this, but for the purposes of the record, we do need to have some sense of how imminent, if you know, John's passing might be.

A. I would say days, maybe weeks if we're lucky. Last week the R.N. with our hospice service pulled me aside after their visit with John to tell me I should start preparing because she believes the end is close.

Q. Have you seen the form that's used for a Certificate of Death in Ohio?

A. I have.

Q. And is a copy of that form present in front of you as Plaintiffs' Exhibit 3?

A. It is.

[21] Q. Now there's a box Number 10 where it says Marital Status at Time of Death. Did I read that correctly?

A. Yes, you did.

Q. And if this court does not act, how will that box be filled in?

A. Unmarried.

Q. And the next box – and just to finish that thought, how should it be filled in?

A. Married.

Q. And the next box says, Surviving Spouse's Name. If this court doesn't act, how will that box be filled in?

A. It will remain blank.

Q. How should it be filled in?

A. James Obergefell. My name should be there.

Q. So if you would, just tell the Court how the problem with the death certificate and recognition of your marriage by the state of Ohio harms you and John.

A. And I have to read this; otherwise, I will probably not get through it.

Q. That's okay. Go ahead.

A. Your Honor, during our 20 years together, John and I have taken care of each other during good times and bad, for richer and in poorer, and in sickness and in health.

For the past two years, I've had the honor of caring for [22] him as ALS has stolen every ability from him. Rarely a day goes by that he doesn't apologize for what he feels he's done to me by getting sick. He is physically incapable of doing anything to thank me or assuage his feelings of guilt, and we all know that there are times when words aren't enough. We need to do something.

What he wants is to die knowing that I will be legally cared for and recognized as his spouse after he is gone. That would give him peace, knowing he was able to care for me as his last thank you.

When I learned that John would forever be listed as unmarried on his death certificate nor would my name be listed as his spouse, my heart broke. John's final record as a person and as a citizen of Ohio should reflect and respect our 20-year relationship and legal

marriage. Not to do so is hurtful, and it is hurtful for the rest of time.

I would like you to look at this picture. It's a photograph of our portrait we had painted about five years into our relationship. It's painted from photographs the artist took in Spring Grove Cemetery. Why Spring Grove? A couple of reasons. It's a beautiful, peaceful place that we both love. But it is also where John's mother's family plot is located. John has always planned to be memorialized on that family plot, and his plan changed to include me. However, we later learned that interment rules put in place by his grandfather and his [23] grandfather's siblings at the time the property was purchased limited burials and memorials to descendants and married spouses only. John can be memorialized on the family plot, but Spring Grove interprets the interment rules and there is no guarantee that they will recognize our marriage and allow me to be there as well if Ohio does not.

We've been beside each other for more than 20 years, and we deserve to be beside each other in perpetuity. We want the option to do that in the family plot in Spring Grove, but that should not require keeping John's remains in limbo or having his life go unmarked for an indefinite period of time.

It is impossible for me to explain how or describe why, but getting married changed everything. We feel different. Life feels different. We feel better. We feel more connected and more valued.

John's life will end soon. I know that, and he knows that. What a horrible thing to look at your spouse at the end of your life and have your last thoughts be, I love you, Jim, but I still can't legally call you husband in a state where we built our life together, paid taxes,

and were productive members of society. I'm sorry I couldn't take care of you as a thank you for the way that you took care of me.

I will have to live with that the rest of my life, knowing that those were his last thoughts and not, I love you, Jim, my husband.

[24] We very much want a ruling that gets clear direction on the death certificate. That ruling will not just be an order about the details of death, it will be much more because, Judge, it will state the reasons for your order, and that is even more important.

Every day John and I live without equal protection. Every day we are treated differently than opposite sex couples who go to other states and are married, and that denies us both dignity and justice. To hear a federal judge in Ohio say to me and say to John before he dies that our marriage is equal and that it will be recognized would mean that we can stop living in uncertainty and inequality, allow us to focus solely on John's quality of life and permit us to fully and truly end John's life together as a married couple.

Each day without that right is a day too long. Everyone deserves to die with dignity. To allow our marriage to remain unrecognized by our home state and to allow me, his spouse, to remain in legal limbo is to cause John to die without dignity. There is no reparation for the harm that causes us.

Thank you.

MR. GERHARDSTEIN: Thank you, Judge. If you have no further questions, I'll reserve further argument until after we hear from defense.

THE COURT: Adverse parties wish to inquire?

MS. COONTZ: No, Your Honor.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed 07/22/13]

Case No. 1:13-cv-501

JAMES OBERGEFELL, ET AL.

Plaintiffs,

vs.

JOHN KASICH, ET AL.

Defendants.

Judge Timothy S. Black

ORDER GRANTING PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

This is not a complicated case. The issue is whether the State of Ohio can discriminate against same sex marriages lawfully solemnized out of state, when Ohio law has historically and unambiguously provided that the validity of a marriage is determined by whether it complies with the law of the jurisdiction where it was celebrated.

Throughout Ohio's history, Ohio law has been clear: a marriage solemnized outside of Ohio is valid in Ohio if it is valid where solemnized. Thus, for example, under Ohio law, out-of-state marriages between first cousins are recognized by Ohio, even though Ohio law does not authorize marriages between first cousins. Likewise, under Ohio law, out of state marriages of

minors are recognized by Ohio, even though Ohio law does not authorize marriages of minors.

How then can Ohio, especially given the historical status of Ohio law, single out same sex marriages as ones it will not recognize? The short answer is that Ohio cannot ... at least not under the circumstances here.

By treating lawful same sex marriages differently than it treats lawful opposite sex marriages (*e.g.*, marriages of first cousins and marriages of minors), Ohio law, as applied to these Plaintiffs, likely violates the United States Constitution which guarantees that "No State shall make or enforce any law which shall ... deny to any person within its jurisdiction equal protection of the laws."

The end result here and now is that the local Ohio Registrar of death certificates is hereby ORDERED not to accept for recording a death certificate for John Arthur that does not record Mr. Arthur's status at death as "married" and James Obergefell as his "surviving spouse."

I. AGREED FACTS AND CIRCUMSTANCES

Less than a month ago, on June 26, 2013, the United States Supreme Court issued its historic decision in *United States v. Windsor*, __ U.S. __, 133 S.Ct. 2675 (2013). The Supreme Court held that the federal Defense of Marriage Act ("DOMA"), which denied recognition to same-sex marriages for purposes of federal law, was unconstitutional, as it denied fundamental fairness and equal protection of the law to gay citizens. While the holding in *Windsor* is ostensibly limited to a finding that the federal government cannot refuse to recognize state laws authorizing same sex marriage, the issue whether States can refuse to

recognize out-of-state same sex marriages is now surely headed to the fore. Indeed, just as Justice Scalia predicted in his animated dissent, by virtue of the present lawsuit, "the state-law shoe" has now dropped in Ohio. *Windsor*, 133 S.Ct. at 77-78.

Plaintiffs James Obergefell and John Arthur are male Cincinnati residents who have been living together in a committed and intimate relationship for more than twenty years, and they were very recently legally married in the state of Maryland pursuant to the laws of Maryland recognizing same sex marriage.

Mr. Arthur is currently a hospice patient. He is dying of amyotrophic lateral sclerosis ("ALS"). ALS is a progressive disease that has caused Mr. Arthur severe and worsening muscle deterioration, has no known cure, and is fatal.

On July 11, 2013, Plaintiffs traveled to Maryland in a special jet equipped with medical equipment and a medical staff necessary to serve Mr. Arthur's needs, whereupon Plaintiffs were married in the jet as it sat on the tarmac in Anne Arundel County, Maryland. They returned to Cincinnati that same day.

Plaintiffs' marriage is legally recognized in Maryland and by the federal government by virtue of the very recent and historic decision of the United States Supreme Court in *United States v. Windsor*, __ U.S. __, 133 S.Ct. 2675 (2013).

Plaintiffs' marriage is not recognized in Ohio, as legal recognition of same-sex marriages is prohibited by Ohio law enacted in 2004. *See* Ohio Rev. Code. § 3101.01(C)(2)&(3) and Ohio Constitution Art. XV, §11.

Mr. Arthur is certain to die soon. Consistent with Ohio law, his death record will list his "marital status at time of death" as "unmarried" and will not record Mr. Obergefell as the "surviving spouse."

II. PLAINTIFFS' MOTION

Plaintiffs seek an order of this Court declaring unconstitutional the Ohio laws forbidding recognition of legal same sex marriages from other states and requiring the Registrar of Ohio death certificates to record John Arthur as "married" and to record James Obergefell as his "surviving spouse" at the time of Mr. Arthur's death, which is imminent.

III. STANDARD OF REVIEW

In determining whether to grant injunctive relief, this Court must weigh four factors: (1) whether the moving party has shown a strong likelihood of success on the merits; (2) whether the moving party will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). These four considerations are factors to be balanced, not prerequisites that must be met. *McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 459 (6th Cir. 1997), and there is no "rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief." *Tate v. Frey*, 735 F.2d 986, 990 (6th Cir. 1984).

Plaintiffs bear the burden of demonstrating their entitlement to a preliminary injunction, and an "injunction is an extraordinary remedy which should

be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it."

Overstreet, 305 F.3d at 513. In the Sixth Circuit, "[t]he standard for issuing a temporary restraining order is logically the same as for a preliminary injunction with emphasis, however, on irreparable harm[.]" *Reid v. Hood*, No. 1:10 CV 2842, 2011 U.S. Dist. LEXIS 7631, at *2 (N.D. Ohio Jan 26, 2011) (citing *Motor Vehicle Bd. of Calif. v. Fox*, 434 U.S. 1345, 1347 n.2 (1977)). Moreover, "[a]lthough no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000).

Even if the court is not certain that a plaintiff is likely to succeed on the merits, a preliminary injunction is still appropriate where the plaintiff shows "'serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant'" or if "the merits present a sufficiently serious question to justify further investigation." *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229-30 (6th Cir. 1985) (quoting *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)).

IV. ANALYSIS

The Fourteenth Amendment to the Constitution of the United States provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV.

Plaintiffs, a same-sex couple, are legally married in Maryland. They reside in Ohio where their marriage is not recognized as valid. They are treated differently than they would be if they were in a comparable opposite-sex marriage. By treating lawful same sex marriages differently than it treats lawful opposite sex marriages (*e.g.*, marriages of first cousins and marriages of minors), Plaintiffs assert that the Ohio laws barring recognition of out-of-state same sex marriages, enacted in 2004, violate equal protection.

Although the law has long recognized that marriage and domestic relations are matters generally left to the states, *see Ex parte Burrus*, 136 U.S. 586, 593-94 (1890), the restrictions imposed on marriage by states, however, must nonetheless comply with the Constitution. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (statute limiting marriage to same-race couples violated equal protection and due process); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (statute restricting from marriage persons owing child support violated equal protection).

In *Windsor*, the Supreme Court again applied the principle of equal protection to a statute restricting marriage when it reviewed the constitutionality of the federal Defense of Marriage Act ("DOMA"), which denied recognition to same-sex marriages for purposes of federal law. This included marriages from the twelve states and District of Columbia in which same-sex couples could legally marry. The Supreme Court held that the federal law was unconstitutional because it violated equal protection and due process principles guaranteed by the Fifth Amendment. *Windsor*, 133 S. Ct. at 2675.

In reality, the decision of the United States Supreme Court in *Windsor* was not unprecedented as the Supreme Court relied upon its equal protection

analysis from an earlier case, where, in 1996, the Court held that an amendment to a state constitution, ostensibly just prohibiting any special protections for gay people, in truth violated the Equal Protection Clause, under even a rational basis analysis. *Romer v. Evans*, 517 U.S. 620 (1996).

In *Romer*, the Supreme Court struck down Colorado's Amendment 2 because, the Court held, "[w]e cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." *Id.* at 635. The Supreme Court deemed this "class legislation ... obnoxious to the prohibitions of the Fourteenth Amendment." *Id.* (quoting *Civil Rights Cases*, 109 U.S. 3, 24 (1883)).

As the Supreme Court in *Romer* held so succinctly: [Colorado law] "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause[.]" 517 U.S. at 635-36.

As the Supreme Court explained in striking down DOMA, "[t]he avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Windsor*, 133 S. Ct. at 2693.

Similarly, in *Windsor*, the Supreme Court cited *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973), for the proposition that a legislative desire to harm a politically unpopular group of people cannot justify disparate treatment of that group. *Windsor*, 133 S. Ct. at 2693. In *Moreno*, a federal statute prohibiting households containing "unrelated persons" from qualifying for food stamps was held to be in violation of the Equal Protection Clause under a rational basis analysis. The legislative purpose of the statute was to prohibit "hippies" from taking advantage of food stamps. The Supreme Court held that "the classification here ... is wholly without any rational basis." *Moreno*, 413 U.S. at 538. Likewise, in *Windsor*, the Supreme Court held that the purpose of the federal DOMA was "to impose inequality, not for other reasons like governmental efficiency." 133 S. Ct. at 2694.

Under Supreme Court jurisprudence, states are free to determine conditions for valid marriages, but these restrictions must be supported by legitimate state purposes because they infringe on important liberty interests around marriage and intimate relations.

In derogation of law, the Ohio scheme has unjustifiably created two tiers of couples: (1) opposite-sex married couples legally married in other states; and (2) same-sex married couples legally married in other states. This lack of equal protection of law is fatal.

As a threshold matter, it is absolutely clear that under Ohio law, from the founding of the State through at least 2004, the validity of an opposite-sex marriage is to be determined by whether it complies with the law of the jurisdiction where it was celebrated. That is, a marriage solemnized outside of

Ohio is valid in Ohio if it is valid where solemnized. Thus the leading compendium of Ohio law states:

"Generally, a marriage solemnized outside of Ohio is valid in Ohio if it is valid where solemnized. Thus, the validity of a common-law marriage is determined by the law of the state where it was consummated, and that of a solemnized marriage by the law of the state where it was contracted. Likewise, a marriage created in a foreign nation is valid according to that nation's laws. [...] The fact that the parties to a marriage left the state to marry in order to evade Ohio's marriage laws is immaterial to the marriage's validity in Ohio." *See* 45 Ohio Jur. 3d Family Law § 11.

Longstanding Ohio law has been clear: a marriage solemnized outside of Ohio is valid in Ohio if it is valid where solemnized. This legal approach is firmly rooted in the longstanding legal principle of *"lex loci contractus"—i.e.*, the law of the place of the contracting controls. Ohio has adopted this legal approach from its inception as a State.

Thus, for example, under Ohio law, as declared by the Supreme Court of Ohio in 1958, out-of-state marriages between first cousins are recognized by Ohio, even though Ohio law does not authorize marriages between first cousins. *Mazzolini v. Mazzolini*, 155 N.E.2d 206, 208 (Ohio Sup. Ct. 1958) (marriage of first cousins was legal in Massachusetts and therefore is legal in Ohio regardless of the Ohio statute to the contrary).

Likewise, under Ohio law, out-of-state marriages of minors are recognized by Ohio, even though Ohio law does not authorize marriages of minors. *See Hardin v. Davis*, 16 Ohio Supp. 19, at *22 (Com. Pl. Hamilton Co. May 18, 1945) ("But, although first cousins cannot

[25] MR. HERZIG: No, Your Honor.

THE COURT: You can step down sir.

THE WITNESS: Thank you.

(Mr. Obergefell resumed his seat at counsel table.)

* * * *

1958) (Marriage of first cousins was legal in Massachusetts and therefore is legal in Ohio regardless of Ohio statute to contrary).

29. More than 1,000 federal benefits, privileges and responsibilities are impacted by marital status. Opposite-sex couples who reside in Ohio and not in the jurisdictions where they celebrated their legal marriages will be entitled to all of those federal benefits even if (e.g., due to kinship or age) their marriages would not have been recognized in Ohio had they attempted to marry in Ohio. Same-sex married couples including James and John who do not reside in jurisdictions where they celebrated their legal marriages may be denied most of those federal benefits solely because they live in Ohio. Many state and private employer benefits will also be denied to same-sex couples married legally in other states and now residing and/or working in Ohio.

30. The different treatment of same-sex marriages celebrated in other jurisdictions from opposite-sex marriages celebrated in other jurisdictions is not supported by a legitimate state interest and imposes severe harm on same-sex couples including Plaintiffs James and John and Plaintiff David Michener who was married to William Ives.

E. Need for Injunction

31. James and John have been in love for more than twenty years. They very much want the world to officially remember and record their union as a married couple.

32. One very personal reflection of the harm imposed by defendants is evident from the death

record. Unfortunately John is likely to die soon. If John dies first, the death record should record his "marital status at time of death" as "married." Unless this Court acts, his death record, consistent with Ohio law, will list his status as unmarried. That form should also record James as the "surviving spouse". Unless this Court acts, the death record will be blank for surviving spouse. That is, unless this court acts, the peimanent death records for James and for John will not reflect their marriage at all. Opposite-sex couples married in other jurisdictions under circumstances otherwise not permitted in Ohio are treated completely differently. Their marriages will be reflected as valid and recognized on the death certificates of these opposite-sex couples.

33. These same issues are present for David Michener. His husband has died and he urgently needs to bring closure to the family in a manner that respects their marriage and the wishes of the decedent to be cremated. A death certificate is needed in order to proceed with a cremation.

34. Defendant Jones is responsible for keeping all death certificates. She supplies forms and instructions for filling out forms. Ohio law demands that she require that each death certificate, when presented for filing, be completed in accordance with Ohio law.

35. Because of Ohio's OH Const. Art. XV, §11 and Ohio Rev. Code. § 3101.01(C) (2) prohibitions on same sex marriage, Defendant Jones requires a person filling out the death certificate of a decedent who is married to a person of the same sex to

marry in Ohio, it has been held that if they go to another state where such marriages are allowed, marry, and return to Ohio, the marriage is legal in Ohio"); *see also Slovenian Mut. Ben. Ass'n v. Knafelj*, 173 N.E. 630, 631 (Ohio App. 1930) ("It is true that, under the laws of Ohio, if she were his first cousin he could not marry her; but they could go to the state of Michigan, or the state of Georgia, and perhaps many other states in the United States, and intermarry, and then come right back into Ohio and the marriage would be legal"); *see also Peefer v. State*, 182 N.E. 117, 121 (Ohio App. 1931) (where underage couples leave the state to marry in a state in which their marriage is valid and return to Ohio, the marriage cannot be set aside based on Ohio's law against marriage of underage people); *see also Courtright v. Courtright*, 1891 Ohio Misc. LEXIS 161, at *7, *aff'd without opinion*, 53 Ohio 685 (Ohio 1895) (marriage between persons considered underage in Ohio married in a state where their marriage is legal "cannot be set aside, either because it was not contracted in accordance with the law of this state, or because the parties went out of the state for the purpose of evading the laws of this state").

Quintessentially, Plaintiffs have established a substantial likelihood that they will prevail at trial on their claim that by treating lawful same sex marriages differently than it treats lawful opposite sex marriages (*e.g.*, marriages of first cousins and marriages of minors), Ohio law, as applied here, violates the United States Constitution which guarantees that "No State shall make or enforce any law which shall...deny to any person within its jurisdiction equal protection of the laws."

Moreover, as the United States Supreme Court found in *Windsor*, there is no legitimate state purpose served by refusing to recognize same-sex marriages celebrated in states where they are legal. Instead, as in *Windsor*, and at least on this early record here, the very purpose of the Ohio provisions, enacted in 2004, is to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Windsor*, 133 S.Ct. at 2639. The purpose served by treating same-sex married couples differently than opposite-sex married couples is the same improper purpose that failed in *Windsor* and in *Romer*: "to impose inequality" and to make gay citizens unequal under the law. *See Windsor*, 133 S.Ct. at 2694; *see Romer*, 517 U.S. at 635-36. It is beyond cavil that it is constitutionally prohibited to single out and disadvantage an unpopular group.

Even if there were proffered some attendant governmental purpose to discriminate against gay couples, other than to effect pure animus, it is difficult to imagine how it could outweigh the severe burden imposed by the ban imposed on same-sex couples legally married in other states. Families deserve the highest level of protection under the First Amendment right of association:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

Zablocki v. Redhail, 434 U.S. 374, 384, (1978) (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). Even if the classification of same-sex couples legally married in other states is reviewed under the least demanding rational basis test, this Court on this record cannot find a rational basis for the Ohio provisions discriminating against lawful, out-of-state same sex marriages that is not related to the impermissible expression of disapproval of same-sex married couples.

Consequently, Plaintiffs have demonstrated a strong likelihood of success on the merits.

Moreover, denying Plaintiffs their associational rights under the circumstances presented here imposes irreparable harm. Constitutional violations are routinely recognized as triggering irreparable harm unless they are promptly remedied. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (loss of constitutional "freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). As stated, rights associated with marriage are fundamental. *Zablocki*, 434 U.S. at 374. Thus, this Court has routinely concluded that "Plaintiffs will suffer irreparable harm if the Court does not issue the injunction because of the threatened infringement of the Plaintiffs' fundamental rights." *See, e.g., Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235, 1242-43 (S.D. Ohio 1993) *rev'd and vacated*, 54 F.3d 261 (6th Cir. 1995) *cert. granted, judgment vacated*, 518 U.S. 1001 (1996). In fact, "when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of

irreparable injury is necessary." § 11A Fed. Prac. & Proc. Civ. § 2948.1 (2d ed.).[1]

In addition to the alleged denial of Plaintiffs' constitutional rights, the Court must also consider the fact that Mr. Arthur is in hospice care and death is imminent. Without a temporary restraining order, the official record of Mr. Arthur's death, and the last official document recording his existence on earth, will incorrectly classify him as unmarried, despite his legal marriage to Mr. Obergefell. The death certificate will also incorrectly fail to record Mr. Obergefell as the "surviving spouse," which status he lawfully enjoys. Furthermore, Mr. Arthur wants to be buried in his family plot at Spring Grove Cemetery. He also wants

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[1] *See, e.g., Overstreet,* 305 F.3d at 578 (6th Cir. 2002) (a plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of plaintiff's constitutional rights); *ACLU of KY v. McCreary County, Kentucky*, 354 F.3d 438, 445 (6th Cir. 2003) (if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (recognizing that the loss of First Amendment rights, for even a minimal period of time, constitutes irreparable harm) (citations omitted); *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3rd Cir. 1997) (denial of preliminary injunctive relief was irreparable harm to plaintiffs' voting and associational rights); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992) (holding that plaintiffs may establish irreparable harm based on an alleged violation of their Fourth Amendment rights); *McDonell v. Hunter*, 746 F.2d 785, 787 (8th Cir. 1984) (finding that a violation of privacy constitutes an irreparable harm); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (holding allegation of violation of Eighth Amendment rights sufficient showing of irreparable harm); *Doe v. Mundy*, 514 F.2d 1179 (7th Cir 1975) (denial of constitutional privacy right was irreparable harm); *Beerheide v. Zavaras*, 997 F.Supp. 1405 (D.C. Colo. 1998) (irreparable harm satisfied by allegation of deprivation of free exercise of religion).

Mr. Obergefell to be buried next to him someday. The family plot directive limits those who may be interred in the plot to descendants and married spouses. Thus, without a temporary restraining order, Mr. Arthur's burial may be delayed or his remains may have to be exhumed when this case is finally decided. *See* Yankton *Sioux Tribe v. U.S. Army Corps of Engineers*, 209 F. Supp. 2d 1008, 1022 (D.S.D. 2002) (disruption of human remains can be irreparable harm).

Finally, the uncertainty around this issue during Mr. Arthur's final illness is the cause of extreme emotional hardship to the couple. Dying with an incorrect death certificate that prohibits Mr. Arthur from being buried with dignity constitutes irreparable harm. Furthermore, Mr. Arthur's harm is irreparable because his injury is present now, while he is alive. A later decision allowing an amendment to the death certificate cannot remediate the harm to Mr. Arthur, as he will have passed away.

Moreover, there is absolutely no evidence that the State of Ohio or its citizens will be harmed by the issuance of an order temporarily restraining the enforcement of these provisions against the Plaintiffs in this case. No one beyond Plaintiffs themselves will be affected by such a limited order at all. Without an injunction, however, the harm to Plaintiffs is severe. Plaintiffs are not currently accorded the same dignity and recognition as similarly situated opposite-sex couples. Moreover, upon Mr. Arthur's death, Plaintiffs' legally valid marriage will be incorrectly recorded in Ohio as not existing. Balanced against this severe and irreparable harm to Plaintiffs is the truth that there is no evidence in the record that the issuance of a preliminary injunction would cause substantial harm to the public.

And, as a final consideration, "the public interest is promoted by the robust enforcement of constitutional rights." *Am. Freedom Def. Initiative v. Suburban 15 Mobility for Reg. Transp.*, 698 F.3d 885, 896 (6th Cir. 2012).

Weighing all factors applicable to analyzing whether injunctive relief should issue, the Court finds that each factor supports the granting of a temporary restraining order.

V. CONCLUSION

This Court finds that Plaintiffs have established by clear and convincing evidence their entitlement to injunctive relief. Accordingly, Plaintiffs' motion for a temporary restraining order (Doc. 3) is GRANTED, and a temporary restraining order shall issue by separate order, directing, *inter alia*, that the local Ohio Registrar of death certificates is hereby ORDERED not to accept for recording a death certificate for John Arthur which does not record his status as "married" and/or does not record James Obergefell as Mr. Arthur's "surviving spouse" at the time of Mr. Obergefell's death, which is imminent.

IT IS SO ORDERED.

Date: July 22, 2013

/s/ Timothy S. Black
Timothy S. Black
United States District Judge

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed 09/03/13]

Case No. 13-cv-501

JAMES OBERGEFELL AND JOHN ARTHUR
C/O GERHARDSTEIN & BRANCH, LPA
432 Walnut Street Suite 400
Cincinnati, Ohio 45202
and

DAVID BRIAN MICHENER
C/O GERHARDSTEIN & BRANCH, LPA
432 Walnut Street Suite 400
Cincinnati, Ohio 45202

Plaintiffs,

vs.

JOHN KASICH
77 South High Street 30th Floor
Columbus, OH 43215
and

MIKE DEWINE,
Attorney General of Ohio
30 E. Broad Street, 14th Floor
Columbus, OH 43215
and

CAMILLE JONES, M.D.
Registrar,
CITY OF CINCINNATI HEALTH DEPARTMENT,
Office of Vital Records
1525 Elm Street, 4th floor
Cincinnati, OH 45202

Defendants.

Judge

AMENDED VERIFIED COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND DECLARATORY AND INJUNCTIVE RELIEF

I. PRELIMINARY STATEMENT

1. This civil rights case challenges as unconstitutional the Ohio statute and state constitution that deny legal recognition in Ohio to the marriages of same-sex couples who are married in one of the many states and numerous foreign countries where same-sex marriages are legal. The Obergefell-Arthur plaintiffs have been in a committed relationship for over twenty years. John Arthur suffers from debilitating ALS disease and is currently a hospice patient. Following the U.S. Supreme Court's historic decision *United States v. Windsor,* the couple traveled to Maryland and was married in accordance with the laws of that state. Now back in Ohio, their marriage is not recognized by the state of Ohio for any purpose. Meanwhile, the marriages of opposite-sex couples that are legal in other states but would not be allowed in Ohio (e.g., marriages of first cousins or a young partner) are routinely accepted in Ohio if those marriages are legal in the state where they are celebrated. This recognition of opposite-sex marriages but rejection of same-sex marriages that do not meet the Ohio criteria for marriage violates rights secured to the plaintiffs by the United States Constitution. Plaintiff David Michener was married to William Herbert Ives on July 22, 2013, in the state of Delaware. Mr. Ives died on Tuesday, August 27,

2013. Mr. Michener seeks a death certificate reflecting his status as spouse. A death certificate is needed now in order to proceed with a cremation of Mr. Ives on Wednesday, September 4, 2013. Plaintiffs seek declaratory and injunctive relief for themselves and hope to set a precedent that will lead to relief for other same-sex couples.

II. JURISDICTION AND VENUE

2. Jurisdiction over the federal claims is conferred on this Court by 28 U.S.C. §1331 and §1343(3) and (4). Venue is proper under 28 U.S.C. §1391.

III. PARTIES

3. Plaintiff James Obergefell is a resident of Cincinnati, Ohio. He is married to John Arthur.

4. Plaintiff John Arthur is a resident of Cincinnati, Ohio. He is married to James Obergefell.

5. Plaintiff David Michener is a resident of Wyoming, Ohio. He was married to William Herbert Ives. Mr. Ives died at University Hospital in Cincinnati on August 27, 2013.

6. Defendant John Kasich is the Governor of the State of Ohio. In that capacity, he is empowered to ensure that the laws of the State are faithfully executed. *See* Ohio Const. Art. III, § 2. Defendant Kasich is sued in his official capacity.

7. Defendant Mike DeWine is the Attorney General of the State of Ohio. In that capacity he is the chief legal officer of the State of Ohio. Among his duties is the requirement that he advise state and local officials on questions of Ohio law. See Ohio Rev.

Code §109.14. Defendant DeWine is sued in his official capacity.

8. Defendant Dr. Camille Jones, Local Registrar, Cincinnati Health Dept. Office of Vital Records, is responsible for filing death certificates and ensuring the personal information on the death certificate is accurate. Defendant Jones is sued in her official capacity.

V. FACTS

A. James and John Are Married in Maryland

9. James and John have been in a committed relationship and have been Cincinnati residents for more than twenty years.

10. In 2011, John was diagnosed with amyotrophic lateral sclerosis (ALS). The disease has caused progressive and severe muscle deterioration. The disease has no known cure. It is fatal.

11. John is currently a hospice patient.

12. On July 11, 2013, friends and family helped finance a trip by James and John to Maryland. They traveled in a special jet equipped with the medical equipment and a medical staff to serve John's needs.

13. They were married in the jet as it sat on the tarmac at the Baltimore airport in Anne Arundel County, Maryland.

14. They returned to Cincinnati that same day.

B. David and William were Married in Delaware

15. David Michener and William Ives were married in Delaware on July 22, 2013. Their marriage is legally recognized in Delaware.

16. They had been together for eighteen years and they have three adopted children.

17. William died unexpectedly of natural causes at University Hospital in Cincinnati, Ohio on August 27, 2013.

18. His remains are currently at a funeral home in Cincinnati.

19. It was his request that his remains be cremated. A cremation is scheduled for Wednesday, September 4, 2013.

20. A death certificate must be issued before the cremation can be permitted.

21. Surviving spouse David Michener has requested a death certificate that reflects William's status as married spouse and lists David as the surviving spouse.

C. The Marriages of James and John and of David and William are not Recognized in Ohio

22. The marriage of James and John is legally recognized in Maryland.

23. The marriage of David and William is legally recognized in Delaware.

24. Their marriages are also recognized by the federal government by virtue of the decision in

United States v. Windsor, 133 S.Ct. 2675 (June 26, 2013).

25. Their marriages are not recognized in Ohio.

26. Ohio law prohibits legal recognition of the marriage of James and John. It also prohibits legal recognition of the marriage of David and William. Ohio Rev. Code. § 3101.01(C)(2) states, "Any marriage entered into by persons of the same-sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state."

27. The Ohio constitution also prohibits recognition of the marriages of James and John and of David and William. OH Const. Art. XV, §11 states, "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

D. Marriages of Opposite-Sex Couples are Treated Differently

28. Opposite-sex couples do face restrictions in Ohio on who may marry. ORC §3101.01(A) states, "Male persons of age eighteen years and female persons of the age of sixteen years, *not nearer of kin than second cousins...may* be joined in marriage." (emphasis added). But the validity of their marriages is determined by the law of the state where their marriage was celebrated. *Mazzolini v. Mazzolini,* 168 Ohio St. 357, 358 (Ohio Sup. Ct.

indicate the decedent is not married and to not include the spouse's name on the certificate.

36. Upon information and belief, were it not for this Court's temporary restraining order, Defendant Jones would not allow John's death certificate to indicate he was married and that his spouse was James because of the state laws.

37. Defendant Jones has received a request to issue a death certificate reflecting the death of William Herbert Ives. She has requested, through her counsel, that she be given direction from this court on how to respond to this request.

38. There is no adequate remedy at law. James and John are suffering irreparable harm. David Michener is also suffering irreparable harm. There is no harm to the state or local governments by granting an injunction prohibiting enforcement of the challenged statute and Ohio constitution. The harm to plaintiffs is severe. The public interest is clearly served by this court acting to order recognition in Ohio of same-sex marriages celebrated in other jurisdictions consistent with the manner in which Ohio treats similarly situated opposite-sex couples. Only prompt action by this federal court ordering declaratory and injunctive relief will serve the public interest.

VI. CLAIM FOR RELIEF

First Claim–42 U.S.C. §1983– United States Constitution

39. Defendants, acting under color of law, have violated rights secured to the plaintiffs by the First and Fourteenth Amendments to the United States Constitution including the right of association, the

right to due process of law, and the right to equal protection under the law.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court;

A. Issue a declaratory judgment that the statute and Ohio Constitutional provision at issue in this case, as applied to the plaintiffs, violate; the constitutional and statutory rights of plaintiffs;

B. Issue a preliminary and permanent injunction against the Defendants and all those acting in concert prohibiting enforcement of the laws, as applied, at issue in this action;

C. Award to Plaintiffs reasonable costs, expenses and attorney fees;

E. Award such other and further relief as this Court shall deem just and reasonable,

Respectfully submitted,

I HAVE READ THESE ALLEGATIONS AND THEY ARE TRUE

/s/ David Michener
David Michener

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 09/26/13]

Case No. 13-cv-501

JAMES OBERGEFELL AND JOHN ARTHUR
C/O GERHARDSTEIN & BRANCH, LPA
432 Walnut Street Suite 400
Cincinnati, Ohio 45202

and

DAVID BRIAN MICHENER
C/O GERHARDSTEIN & BRANCH, LPA
432 Walnut Street Suite 400
Cincinnati, Ohio 45202

vs.

ROBERT GRUNN
C/O Grunn Funeral Home
825 Main Street
Cincinnati, OH 45202

Plaintiffs,

THEODORE E. WYMYSLO, MD,
246 N. High Street
Columbus, OH 43215
In his official capacity as the Director of the Ohio Department of Health

and

CAMILLE JONES, M.D.
1525 Elm Street, 4th floor
Cincinnati, OH 45202
In her official capacity as Registrar, City of Cincinnati Health Department, Office of Vital Records

Defendants.

Judge, Timothy S. Black

SECOND AMENDED COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND DECLARATORY AND INJUNCTIVE RELIEF

I. PRELIMINARY STATEMENT

1. This civil rights case challenges as unconstitutional the application of the Ohio statute and state constitutional amendment that deny legal recognition in Ohio to the marriages of same-sex couples who are married in one of the many states and numerous foreign countries where same-sex marriages are legal. The Obergefell-Arthur plaintiffs, for example, have been in a committed relationship for over twenty years. John Arthur suffers from debilitating ALS disease and is currently a hospice patient. Following the U.S. Supreme Court's historic decision *United States v. Windsor*, the couple traveled to Maryland and was married in accordance with the laws of that state. Now back in Ohio, their marriage is not recognized by the state of Ohio for any purpose. Meanwhile, the marriages of opposite-sex couples that are legal in other states but would not be allowed in Ohio (e.g., marriages of first cousins or a young partner) are routinely accepted in Ohio if those marriages are legal in the state where they are celebrated. This recognition of opposite-sex marriages but rejection of same-sex marriages that do not meet the Ohio criteria for marriage violates rights secured to the plaintiffs by the United States Constitution. Plaintiffs seek an order requiring defendants to issue a death certificate that reflects

their status as married and their survivor as the surviving spouse. Plaintiff Robert Grunn is a licensed funeral director and has a statutory duty to serve as an accurate and truthful reporter of personal facts with respect to applications for death certificates. He sues on his own behalf and on behalf of his same-sex married clients in order that same-sex marriages be properly recognized on Ohio death certificates.

II. JURISDICTION AND VENUE

2. Jurisdiction over the federal claims is conferred on this Court by 28 U.S.C. §1331 and §1343(3) and (4). Venue is proper under 28 U.S.C. §1391.

III. PARTIES

3. Plaintiff James Obergefell is a resident of Cincinnati, Ohio. He is married to John Arthur.

4. Plaintiff John Arthur is a resident of Cincinnati, Ohio. He is married to James Obergefell.

5. Plaintiff David Michener is a resident of Wyoming, Ohio. He was married to William Herbert Ives. Mr. Ives died at University Hospital in Cincinnati on August 27, 2013.

6. Plaintiff Robert Grunn is a funeral director and embalmer licensed by the State of Ohio. He is the managing partner at the Grunn Funeral Home at 825 Main Street in Cincinnati, Ohio, 45202 and at the Grunn Lusain Memorial Center at 910 Patterson Blvd in Dayton, OH 45402.

7. Defendant Theodore E. Wymyslo, M.D., is the Director of the Ohio Department of Health. In that capacity he is responsible for overseeing the administration of all statutes and regulations that relate

to the State of Ohio's system for recording vital statistics, including but not limited to the issuance of death certificates. Defendant Wymsylo is sued in his official capacity for injunctive relief only.

8. Defendant Dr. Camille Jones, Local Registrar, Cincinnati Health Dept. Office of Vital Records, is responsible for filing death certificates and ensuring the personal information on the death certificate is accurate. Defendant Jones is sued in her official capacity for injunctive relief only.

V. FACTS

A. James and John Are Married in Maryland

9. James and John have been in a committed relationship and have been Cincinnati residents for more than twenty years.

10. In 2011, John was diagnosed with amyotrophic lateral sclerosis (ALS). The disease has caused progressive and severe muscle deterioration. The disease has no known cure. It is fatal.

11. John is currently a hospice patient.

12. On July 11, 2013, friends and family helped finance a trip by James and John to Maryland. They traveled in a special jet equipped with the medical equipment and a medical staff to serve John's needs.

13. They were married in the jet as it sat on the tarmac at the Baltimore airport in Anne Arundel County, Maryland.

14. They returned to Cincinnati that same day.

B. David and William were Married in Delaware

15. David Michener and William Ives were married in Delaware on July 22, 2013. Their marriage is legally recognized in Delaware.

16. They had been together for eighteen years and they have three adopted children.

17. William died unexpectedly of natural causes at University Hospital in Cincinnati, Ohio on August 27, 2013.

18. Surviving spouse David Michener requested a death certificate that reflected William's status as "married" and listed David as the surviving spouse.

19. On September 3, 2013 this Court issued a temporary restraining order (Doc. 23) restraining defendants from "accepting a death certificate for William Herbert Ives that does not list his status at the time of death as 'married' and his 'surviving spouse' as David Michener."

20. A death certificate consistent with this Court's order has since been issued and the remains of Mr. Ives have since been cremated.

21. Plaintiff Michener opposes any effort that defendants may take in the future to modify or alter the death certificate of his spouse, Mr. Ives.

22. Further, should Plaintiff Michener die without remarrying he seeks the opportunity to have his marital status listed on his death certificate as "widowed."

C. The Marriages of James and John and of David and William are not Recognized in Ohio

23. The marriage of James and John is legally recognized in Maryland.

24. The marriage of David and William is legally recognized in Delaware.

25. Their marriages are also recognized by the federal government by virtue of the decision in *United States v. Windsor,* 133 S.Ct. 2675 (June 26, 2013).

26. Their marriages are not recognized in Ohio.

27. Ohio law prohibits legal recognition of the marriage of James and John. It also prohibits legal recognition of the marriage of David and William. Ohio Rev. Code. § 3101.01(C)(2) states, "Any marriage entered into by persons of the same-sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state."

28. The Ohio constitution also prohibits recognition of the marriages of James and John and of David and William. OH Const. Art. XV, §11 states, "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

D. Marriages of Opposite-Sex Couples are Treated Differently

29. Opposite-sex couples do face restrictions in Ohio on who may marry. ORC §3101.01(A) states, "Male persons of age eighteen years and female persons of the age of sixteen years, *not nearer of kin than second cousins*...may be joined in marriage." (emphasis added). But the validity of their marriages is determined by the law of the state where their marriage was celebrated. *Mazzolini v. Mazzolini,* 168 Ohio St. 357, 358 (Ohio Sup. Ct. 1958) (Marriage of first cousins was legal in Massachusetts and therefore is legal in Ohio regardless of Ohio statute to contrary).

30. More than 1,000 federal benefits, privileges and responsibilities are impacted by marital status. Opposite-sex couples who reside in Ohio and not in the jurisdictions where they celebrated their legal marriages will be entitled to all of those federal benefits even if (e.g., due to kinship or age) their marriages would not have been recognized in Ohio had they attempted to marry in Ohio. Same-sex married couples including Plaintiffs who do not reside in jurisdictions where they celebrated their legal marriages may be denied many of those federal benefits solely because they live in Ohio. Many state and private employer benefits will also be denied to same-sex couples married legally in other jurisdictions and now residing and/or working in Ohio.

31. The different treatment of same-sex marriages celebrated in other jurisdictions from opposite-sex marriages celebrated in other jurisdictions is not supported by a legitimate state interest

and imposes severe harm on same-sex couples including Plaintiffs James and John and Plaintiff David Michener who was married to William Ives(now deceased).

E. Need for Injunction

32. James and John have been in love for more than twenty years. They very much want the world to officially remember and record their union as a married couple.

33. One very personal reflection of the harm imposed by defendants is evident from the death record. Unfortunately John is likely to die soon. If John dies first, the death record should record his "marital status at time of death" as "married." Unless this Court acts, his death record, consistent with Ohio law, will list his status as unmarried. That form should also record James as the "surviving spouse". Unless this Court acts, the death record will be blank for surviving spouse. That is, unless this court acts, the permanent death records for James and for John will not reflect their marriage at all. Opposite-sex couples married in other jurisdictions under circumstances otherwise not permitted in Ohio are treated completely differently. Their marriages will be reflected as valid and recognized on the death certificates of these opposite-sex couples.

34. These same issues are present for David Michener. At the time he applied for the TRO, his husband has died and he urgently needed to bring closure to the family in a manner that respected their marriage and the wishes of the decedent to be cremated. A death certificate was needed in order to

proceed with a cremation. That death certificate that was issued consistent with this Court's order should not later be altered or amended to delete or eliminate the reference to their marriage or to Mr. Michener's status as a surviving spouse.

35. Defendant Jones is responsible for keeping all death certificates in Cincinnati, Ohio. She supplies forms and instructions for filling out forms. Ohio law requires that she insist that each death certificate, when presented for filing, be completed in accordance with Ohio law.

36. Defendant Wymyslo is responsible for overseeing the administration of all statutes and regulations that relate to the State of Ohio's system for recording vital statistics, including but not limited to the issuance of death certificates.

37. Because of Ohio's OH Const. Art. XV, §11 and Ohio Rev. Code. § 3101.01(C) (2) prohibitions on same sex marriage, Defendant Jones requires a person filling out the death certificate of a decedent who is married to a person of the same sex to indicate the decedent is not married and to not include the spouse's name on the certificate.

38. Upon information and belief, were it not for this Court's temporary restraining order, Defendant Jones would not allow John's death certificate to indicate he was married and that his spouse was James because of the state laws.

39. Before this Court issued the Order, Doc. 23, Defendant Jones received a request to issue a death certificate reflecting the death of William Herbert Ives. She then requested through her counsel that she be given direction from this court on how to

respond to this request. This Court subsequently issued the temporary restraining order.

F. Plaintiff Robert Grunn (Funeral Director) and Need for Declaratory Judgment

40. There is no adequate remedy at law. James and John are suffering irreparable harm. David Michener is also suffering irreparable harm. There is no harm to the state or local governments by granting an injunction prohibiting enforcement of the challenged statute and Ohio constitutional amendment as applied to the plaintiffs with respect to the issuance of death certificates. The harm to plaintiffs is severe. The public interest is clearly served by this court acting to order recognition in Ohio of same-sex marriages celebrated in other jurisdictions consistent with the manner in which Ohio treats similarly situated opposite-sex couples as applied to the issuance of death certificates. Only prompt action by this federal court ordering declaratory and injunctive relief will serve the public interest.

41. As a licensed funeral director, pursuant to R.C. §3705.16, Plaintiff Robert Grunn registers deaths and provides personal information regarding the decedent to the state for inclusion on the death certificate. Plaintiff Grunn has a duty to provide accurate and truthful information.

42. Plaintiff Grunn signs death certificates as a funeral director.

43. Plaintiff Grunn serves a wide variety of clients, including same-sex couples.

44. Some of the same-sex couples whom he serves have been married in jurisdictions that authorize same-sex marriage.

45. In the future he will continue to serve same-sex couples including couples that have been married in jurisdictions that recognize same-sex marriage.

46. Based on his experience with married same-sex couples, he knows it is important that he record their marriage status as "married" or "widowed" and that any surviving spouse be listed by name as the surviving spouse.

47. Among his duties as an Ohio funeral director, Mr. Grunn collects the personal and statistical information of decedents and reports them to the local registrar of vital statistics. Ohio Rev. Code § 3705.16(B). In fulfilling this duty, funeral directors are prohibited from "purposely mak[ing] any false statement." Ohio Rev. Code § 3705.29(A)(1). A violation of this prohibition could lead Mr. Grunn to be fined up to ten thousand dollars or incarcerated for up to five years, or both. Ohio Rev. Code § 3705.99.

48. By serving as a plaintiff in this action, Mr. Grunn is seeking a declaratory judgment clarifying that it is consistent with the law to list a decedent married to a same-sex partner in another jurisdiction that authorizes same-sex marriage as "married" or "widowed" on an Ohio death certificate and that it is consistent with the law to list on that death certificate the name of any surviving spouse.

49. By serving as a plaintiff in this action, Mr. Grunn is also representing the interests of the same-sex couples married in jurisdictions that recognize

same-sex marriage of David Michener and William Ives as applied to their requests for death certificates, violate the constitutional rights of these plaintiffs. Specifically, this court should declare that any of these plaintiffs who die in Ohio shall be entitled to a death certificate listing his status as "married" or "widowed" as appropriate and listing the person who survives from that marriage as the surviving spouse on an Ohio death certificate of the decedent;

B. Issue a declaratory judgment that the statutory and Ohio Constitutional provisions at issue in this case, violate the constitutional rights of those same-sex couples married in jurisdictions that authorize same-sex marriage who become clients of Plaintiff Robert Grunn and about whom he reports information regarding their marital status and status as surviving spouses in support of their requests for death certificates. Specifically, this court should declare that Plaintiff Robert Grunn may, consistent with the constitution, report that a decedent married in a state authorizing same-sex marriage is "married" or "widowed" and report the name of any surviving spouse on an Ohio death certificate he completes in the course of his work as a funeral director in Ohio.

C. Issue a preliminary and permanent injunction against the Defendants and all those acting in concert requiring that they issue to each married plaintiff death certificates that record their marital status as "married" or

"widowed" and that list any survivor as the "surviving spouse." Said injunction shall include a requirement that Defendants Wymyslo and Jones issue directives to local registrars, funeral homes, coroners and others who assist with the completing of Ohio death certificates explaining their duties under the orders of this Court;

D. Award to Plaintiffs reasonable costs, expenses and attorney fees;

E. Award such other and further relief as this Court shall deem just and reasonable.

Respectfully submitted,

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litigated cases pending before administrative agencies, state and federal trial and appellate courts, and the U.S. Supreme Court. I was invited to join the faculty of Cleveland State University's Cleveland-Marshall of Law in 1990 and since that time have been a full-time professor of law.

7. I regularly teach Civil Procedure, Legal Profession (ethics), Remedies, and other practice-oriented courses. Over the past 13 years I have taught a course titled Sexual Orientation and the Law eight times. I designed this course to provide students with an inter-disciplinary lens (i.e. history, medical and social sciences, political science, religion, popular culture, etc.) through which they explore the evolution of law as it has disadvantaged and continues to disadvantage lesbians, gay men, bisexual and transgender ("LGBT") people. I have collected and created all of the materials for the course and have substantially revised and updated the materials each time I teach the course. My course materials include Ohio developments as well as national and international matters.

8. Much of my scholarship addresses the animus historically directed at the LGBT population as well as the historic and continuing rationales for that discrimination. Examples include *The Politicization of Judicial Elections and its Effect on Judicial Independence and LGBT Rights: An Overview of LGBT Equality and Judicial Independence,* 60 CLEVELAND STATE LAW REVIEW 466 (2012); *Many are Chilled but Few are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science will Lead to the Eventual Demise of Legally Sanctioned*

their marriages and who will be his clients and customers now and in the future. On their behalf, as their funeral director, Plaintiff Grunn seeks to secure the right to list the marital status of the decedent as "married" (or, if appropriate, as "widowed") and report the name of the survivor as the "surviving spouse" on the Ohio death certificates for these clients.

VI. CLAIM FOR RELIEF

42 U.S.C. §1983-United States Constitution

50. Defendants, acting under color of law, have violated rights secured to the plaintiffs by the First and Fourteenth Amendments to the United States Constitution including the right of association, the right to due process of law, and the right to equal protection under the law. Specifically Defendants have failed, as applied to the plaintiffs married in jurisdictions that authorize same-sex marriage, to issue death certificates listing said plaintiffs as "married" (or, if applicable, "widowed") and listing the survivor on the death certificate as the "surviving spouse." Plaintiffs reserve the right to raise additional issues should that be necessary in subsequent complaints or lawsuits as circumstances warrant and shall not by virtue of pursuing this as applied challenge be precluded from doing so.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court;

A. Issue a declaratory judgment that the statute and Ohio Constitutional provision at issue in this case, which prohibit recognition of the same-sex marriages of plaintiffs James Obergefell and John Arthur as well as the

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 10/08/13]

Case No. 1:13-cv-501

JAMES OBERGEFELL AND JOHN ARTHUR, ET AL,

Plaintiffs,

VS.

THEODORE E. WYMYSLO, ET AL,

Defendants.

Judge Timothy S. Black

GRUNN DECLARATION

Plaintiffs give notice that they are filing the signed Declaration of Robert Grunn.

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2013, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/ Alphonse A. Gerhardstein
Alphonse A. Gerhardstein # 0032053

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed 10/08/13]

Case No. 1:13-cv-501

JAMES OBERGEFELL AND JOHN ARTHUR, ET AL,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, ET AL,

Defendants.

Judge Timothy S. Black

DECLARATION OF FACTS RELATED TO STANDING TO SUE BY ROBERT GRUNN

I, Robert Grunn, under 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following is true and correct:

1. My name is Robert Grunn and I am a plaintiff in the above action. I have read the second amended complaint filed in this action and can verify that all of the facts related to myself and my work are true. I have been informed that the State Defendant may file a motion to dismiss my claim for lack of standing. I submit this declaration to

provide a statement of facts related to my standing to bring this claim.

2. I have been a licensed funeral director in the State of Ohio for over 22 years.

3. As a funeral director, one of my responsibilities is to originate death certificates. To do this, I collect personal information from the next of kin of the deceased, including whether the deceased was married, single, widowed, or divorced; and if married I collect the surviving spouse's name. Then, I enter the information into the Electronic Death Registration (EDRS) System maintained by the Ohio Department of Health. This is accomplished through special software that is made available to me and other funeral directors by the Department of Health. I follow instructions with respect to death certificate tasks that arc also provided by the Department of Health.

4. I then sign the death certificate and send it to the certifying physician or coroner to certify the cause of death. The death certificate is then returned to me, and I physically take it to the local registrar of vital statistics office to file it and receive certified copies for my clients.

5. For deaths that occur in Cincinnati I take the death certificate to the offices of Camille Jones, Registrar, City of Cincinnati Health Department, Office of Vital Records, 1525 Elm Street, Cincinnati, Ohio 45202.

6. I then deliver certified copies of the death certificate to my clients who use them to receive life insurance payouts, deed automobiles, real estate and other property to survivors, claim

social security survivor benefits, and execute wills, among other things.

7. Due to grief and inexperience with death, my clients often do not realize the importance of death certificates until after I have filed them and returned certified copies.

8. I must sign every death certificate that I originate, and I know that if I purposely make a false statement within a death certificate I will face criminal penalties.

9. My business, Grunn Lusain Memorial Centers, is creating a new business model in our industry. We have significantly cut costs to consumers by using a "non-traditional" funeral home, simplifying funeral plans, and working with clients over the phone and through our website. This has resulted in a rapidly expanding business that serves a diverse clientele.

10. Currently, I am filing around forty death certificates per month.

11. I am gay, active in the gay community, and known within that community as a funeral director who is gay friendly.

12. The Cincinnati location of my business is in the old Carol's On Main, a gay-friendly bar and restaurant that operated for 15 years and is fondly remembered by many gay people in Cincinnati. When I have told members of the gay community that my funeral home is located in the old Carol's On Main, it often sparks a discussion of using my services to celebrate their lives or the lives of their loved ones.

13. I know many same-sex couples who reside in Ohio and were legally married in other states.

14. I know that one of my previous gay clients was married to his partner in another state.

15. I am certain that I will be serving a growing number of same sex couples who have been legally married in other states.

16. I have no control over when people will need my services.

17. When I next originate a death certificate for a decedent who legally married a same-sex spouse in another state, I intend to list the decedent as married and list the decedent's surviving spouse by name. By doing so, I fear I will be prosecuted by Defendant Wymsylo for purposely making a false statement on a death certificate. I would be relieved to have clear direction on how I should complete information about marital status and surviving spouse when completing death certificates for same sex couples married legally in other states but served by me in Ohio. An order from this court would serve that purpose.

Dated: 10/8/2013

/s/ Robert Grunn
Robert Grunn

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
[Filed: 10/11/13]

Civil Action No. 1:13-cv-501

JAMES OBERGEFELL, ET AL.

Plaintiffs,

v.

THEODORE E. WYMYSLO, ET. AL.,

Defendants.

Judge Timothy S. Black

EXPERT DECLARATION OF SUSAN J. BECKER IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

I, Susan J. Becker, pursuant to 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following are my true and correct opinions :

Introduction to Expert Opinions Offered

1. The expert opinions offered in this declaration document the historic and continuing animus directed toward lesbian and gay Ohioans.

2. Among other pernicious consequences, animus directed at gay and lesbian Ohioans resulted in Ohio legislators making substantial amendments

to Ohio Revised Code §3101.01 and §3101.05 in January 2004. Animus also motivated the 2004 ballot initiative that added Article XV, §11 to Ohio's constitution. The 2004 statutory and constitutional amendments prohibit marriages of same-sex couples from occurring in this state and prohibit Ohio from recognizing marriages validly entered in other states by same-sex couples.

3. Ohio Con. Article XV, §11 further prohibits the state and its political subdivisions from creating or recognizing "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." This prohibits same-sex couples from petitioning any level of government in Ohio for other types of relationship recognition – including civil unions and domestic partnerships – that would allow same-sex couples some of the legal rights and obligations automatically bestowed on heterosexual married couples.

Expert Background and Qualifications

4. I have actual knowledge of the matters stated in this declaration, and could testify to these matters if called as a witness.

5. My background, experience, and publications are provided in detail in my curriculum vitae attached as Exhibit A to this declaration. A brief summary is provided here.

6. Upon completion of my judicial clerkship with the Honorable Robert B. Krupansky of the U.S. Court of Appeals for the Sixth Circuit in 1985, I became an associate at the law firm then known as Jones, Day, Reavis and Pogue (now "Jones, Day"). During five years as a Jones, Day associate I

Discrimination Against Sexual Minorities in the United States, 14 AM.U. J. GENDER & LAW 177-252 (2006) *Tumbling Towers as Turning Points: Will 9/11 Usher in a New Civil Rights Era for Gay Men and Lesbians in the United States?;* 9 WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW 207 (2003); *Constitutional Classifications and the Search for the Gay Gene, Symposium: Is There a Pink Slip In Your Genes?* 16 CLEVE. ST. JOU. LAW & HEALTH 27 (2001-2002); *Second Parent Adoptions by Same-Sex Couples in Ohio: An Unsettled and Unsettling Area of Law*, 48 CLEVE. ST. L. REV. 101 (2001); *Court-Created Boundaries Between a Visible Lesbian Mother and Her Children,* XII WISCONSIN WOMEN'S L. J. 331 (1997); and *Child Sexual Abuse Allegations Against a Lesbian or Gay Parent in a Custody or Visitation Dispute: Battling the Overt and Insidious Bias of the Experts and Judges*, 74 DENVER UNIVERSITY L. REV. 75 (1996).

9. In addition to teaching and scholarship, I have also maintained a modest pro bono practice since joining the Cleveland-Marshall College of Law faculty in 1990. The majority of my pro bono work consists of providing legal advice to same-sex couples and gay and lesbian individuals about their rights – or as more appropriately their *lack* of rights – under Ohio law.

10. The statements set forth in this declaration are based on my own research, more than two decades as a practicing lawyer advising lesbian and gay individuals and couples in Ohio, and the work of other attorneys, scholars, and authors, including

those cited in the bibliography attached as Exhibit B.

11. I have been retained by counsel for Plaintiffs in this litigation on a pro-bono basis.

Summary of Opinions

12. It is my opinion that animus directed at lesbians and gay Ohioans served as the primary motivating force for Ohio's ban on same-sex marriages, civil unions and domestic partnerships. Animus is also the motivating factor for Ohio's refusal to recognize same-sex marriages legally entered in other states, while at the same time recognizing marriages from other states that would be void if entered in Ohio, such as marriage between first cousins, marriages between spouses younger than Ohio's age of consent, and common-law marriages.

13. As used here, "animus" has the meaning attributed to it by the United States Supreme Court, to wit, "discriminations of an unusual character" motivated by hostile intent or improper purpose and directed at a historically disfavored minority. *Windsor v. United States*, __ U.S. __, 133 S. Ct. 2675, 2693 (2013), *Romer v. Evans,* 517 U. S. 620, 633 (1996).

14. The Bibliography attached as Exhibit B and additional Exhibits referenced throughout this declaration support the expert opinions offered.

History of Discrimination in Ohio against Lesbian and Gay Citizens

15. Lesbian and gay Ohioans have suffered from the same modes and severity of government-sanctioned and government-ignored discrimination

that are documented on a national level by Professor George Chauncey. The examples of Ohio discrimination provided below are illustrative rather than exhaustive. The specific issue of marriage discrimination is discussed in the section immediately following this one.

16. Neither Ohio's primary anti-discrimination law, R.C. §4112.02, nor any other statute provides protection or recourse for gay and lesbian Ohioans discriminated against in employment, housing, or public accommodation. Some Ohio counties and municipalities have enacted employment discrimination provisions that cover private employers. Only about 20 percent of Ohioans live within these jurisdictions, and the remedies provided are extremely limited. Ohio courts do not recognize a common law public policy exception to the at-will employment doctrine for gay and lesbian workers terminated due to their sexual orientation. Ohio courts do not recognize a cause of action based on sexual harassment when the harassing behavior is due to the plaintiff-victim's sexual orientation.

17. Ohio courts allow an individual gay man or lesbian to adopt a child, but only recognize one legal parent of a child being raised by a same-sex couple. Ohio courts have rejected models embraced by other states to recognize both members of a same-sex couple as parents of the children they are jointly raising. Such models include de facto and psychological parental status, and second-parent adoptions.

18. Instead, if both members of a same-sex couple are jointly parenting a child who is the biological or adopted child of one member of the couple, Ohio courts have, somewhat bizarrely, interpreted the

step-parent provisions of Ohio's adoption statutes as permitting the other member of the couple to adopt the child *only* if the biological or adoptive parent terminates his or her parental rights to the child. See *In re Adoption of Jane Doe*, 130 Ohio App.3d 288, 719 N.E.2d 1071 (Ohio App. 9th Ninth Dist. 1998), *appeal denied* 85 Ohio St. 3d 1467, 709 N.E.2d 173 (1999). Termination of the existing parent's legal relationship with the child allows the partner to establish a legally recognized parent-child relationship in the child, but still leaves the child with only one legally recognized parent.

19. In another unique interpretation of Ohio statutes governing parental rights, the Supreme Court of Ohio decreed in *In re Bonfield*, 97 Ohio St.3d 387, 2002-Ohio-6660, 780 N.E.2d 241(2002), that same-sex partners may enter into a co-custody agreement. The partners must jointly submit the proposed agreement to a juvenile court and convince the court co-custody serves the best interest of the child. As a co-custodian, the non-legally recognized parent has the limited rights articulated in the custody agreement, such as signing field trip forms for school, making certain medical decisions, and possessing the standing necessary to seek visitation with the child if the couple separates. Co-custody does not, however, create the full rights and responsibilities of a legally recognized child-parent relationship. In addition, a same-sex couple's status as "co-custodians" does not create any legally-recognized relationship for the couple that provides the benefits or responsibilities of a legally recognized marriage.

20. Existing Ohio law does not recognize any status that confers rights, benefits or obligations on same-sex couples. Equality advocates are forbidden by Ohio Con. Art. XV, §11 from petitioning the Ohio legislature for the creation of any such status. Domestic partner registries in Athens, Toledo, Dayton, Columbus, Cleveland, and Cleveland Heights confer absolutely no rights or benefits on couples who register. Registration may be deemed by some private employers as evidence of a domestic partnership for the purpose of providing health or other benefits to an employee's same-sex partner, but the decision to offer benefits are and the type of proof necessary to establish domestic partner status remains entirely with the employer and is in no way mandated or controlled by the city ordinances that establish each registry. Ohio courts have upheld the registries against claims that they violate Ohio's Constitutional ban on recognition of same-sex marriage precisely because the registries confer no legal status or benefits to same-sex couples.

21. Ohio R.C. §3313.666 requires school districts to develop policies to prevent "harassment, intimidation, or bullying," but despite multiple, severe attacks on gay students in recent years, the law does not require districts to enact specific policies to protect lesbian or gay students.

22. Ohio R.C. §2927.12 does not include gay men or lesbians in its hate crime legislation.

23. In sum, Ohio law historically has, and continues to, subject gay and lesbian Ohioans and their children to these and other inequities and indignities without legal protection or recourse:

- Denied access to or evicted from housing;
- Denied service in a restaurant, hotel, or other place of public accommodation;
- Denied recognition as victims of hate-motivated crimes;
- Denied adequate protection in public schools that fail to create or to enforce sufficient anti-gay bullying policies, resulting in the infliction of serious physical and emotional injuries;
- Denied employment regardless of qualifications for the job sought;
- Terminated from employment without cause and without substantive law or general due process protections afforded other minorities;
- Required to repeatedly advocate for very limited legal protections and recognition (e.g. the domestic partnership registry in Cleveland, employment protections in Cincinnati), and then required to defend such legislation against repeated legal and political attacks including ballot initiatives campaigns;
- Denied the opportunity to adopt their partners' children, thus leaving their families exposed to legal and other financial disadvantages not experienced by their heterosexual counterparts;
- Forced to rely on "co-custodial" status when raising children together rather than a legally recognized familial status;
- Precluded from jointly adopting a child unrelated to either same-sex partner regardless of the child's need for a stable, permanent home

and the ability of the couple to provide that home;

- Denied local and state tax benefits available to heterosexual married couples;
- Denied access to entitlement programs (welfare benefits, food stamps, Medicaid, etc.) available to heterosexual married couples and their families;
- Barred by hospital staff and/or relatives from their long-time partners' bedsides during serious and final illnesses due to lack of legally-recognized relationship status;
- Denied the remedy of loss of consortium when a partner is seriously injured through the acts of another;
- Denied the remedy of a wrongful death claim when a partner is fatally injured through the wrongful acts of another;
- Excluded from inheriting a partner's possessions through Ohio's intestate succession laws; and
- Evicted from their homes following a partner's death because same-sex partners are in Ohio considered complete strangers to each other in the eyes of the law.

24. Despite the extensive nature of this list, the disadvantages, disenfranchisements and penalties outlined above are illustrative rather than exhaustive. As is obvious from this summary, many of these legally sanctioned inequities are grounded in Ohio's refusal to recognize same-sex marriages validly entered in other states.

25. The injuries Ohio inflicts on same-sex couples are significantly compounded by the U.S. Supreme Court's decision in *Windsor v. United States*, __ U.S. __, 133 S.Ct. 2675, (2013), requiring the federal government to recognize same-sex marriage for federal benefits. Some of these federal benefits will be realized by same-sex couples only if they live in a state that recognizes their marriages. Ohio law denying recognition of same-sex couples thus withholds both state and federal benefits from same-sex couples.

26. As explained below, changes to Ohio's statutory scheme in 2004 and the state constitutional amendment enacted through the 2004 ballot initiative campaign continue to perpetuate these disadvantages, disenfranchisements and penalties at the state and federal level. Both changes to Ohio law resulted from, and continue to foster, animus directed at gay and lesbian Ohioans.

Animus Leading to Legislative Amendments to Ohio R.C. §3101 Denying Recognition of Same-Sex Marriages and Other Forms of Relationship Recognition

27. In 1993, the Supreme Court of Hawaii ruled in *Baehr v. Lewin* that a ban on same-sex marriage violated Hawaii's equal rights amendment. This decision shocked individuals and groups whose members opposed marriage equality primarily on moral and religious grounds.

28. By 1996, these individuals and organizations successfully lobbied Congress to pass the Defense of Marriage Act (DOMA) by arguing that same-sex marriage posed an immediate threat to "traditional marriage" and "traditional family

values." DOMA banned the federal government from recognizing same-sex marriage and declared that states did not have to give "full faith and credit" to same-sex marriages licensed by other states.

29. The 1999 decision by Vermont's highest court which resulted in creation of civil unions in that state (*Baker v. State*) and the 2003 Massachusetts's decision legalizing same-sex marriage in that commonwealth (*Goodridge v. Dept. of Health*) threw more fuel on the anti-equality marriage fire.

30. Prior to 2004, Ohio law limited marriage to opposite sex couples. R.C. §3101.01(A) provided that marriage was reserved for "[m]ale persons of the age of eighteen years,... and female persons of the age of sixteen years ...." In addition, the Ohio constitution contained no broad equality provisions similar to those which supported the same-sex marriage decisions in Hawaii, Vermont and Massachusetts. There was no evidence that the justices then serving on the Supreme Court of Ohio would vote in favor of same-sex marriage or any other form of relationship recognition should the marriage equality issue come before Ohio's highest court.

31. Legislative amendments introduced in the Ohio General Assembly in 1997, 1999 and 2001 proposed to more explicitly deny same-sex couples the opportunity to marry or to obtain recognition of their marriages performed in other states. (Exhibit C: Unsuccessful Ohio DOMAs 1997, 1999, 2001). Both the 1997 proposals in H.B. 160 and the 1999 version in S.B. 240 and H.B. 547 recognized the unwavering stance Ohio courts

had taken against same-sex marriage. S.B. 240, for example, listed "the holdings of the Ohio Supreme Court in *State v. Gans* (1958), 168 Ohio St. 174, 177-178, the Court of Appeals for Franklin County in *Liston v. Pyles* (1997), 1997 Ohio App. Lexis 3627, the Court of Appeals for Summit County in *Dial v. Dial* (1993), 92 Ohio App. 3d 513, 515, and in *Gajovski v. Gajovski* (1991), 81 Ohio App. 3d 11, the Court of Appeals for Cuyahoga County in *Irwin v. Lupardus* (1980), No. 41379, and the Stark County Probate Court in *In re Ladrach* (1987), 32 Ohio Misc. 2d 6" as confirming that "the law of this state does not permit persons of the same sex to marry."

32. In 2001, the Ohio House passed H.B. 234 by a vote of 67 to 29. That legislation proposed to more explicitly limit marriages performed or recognized in Ohio to those entered by opposite sex couples and to place additional restrictions on any type of relationship recognition for same-sex couples in Ohio. Unlike the 1997 and 1999 versions of the proposed legislation, H.B. 234 omitted any reference to the substantial body of existing Ohio case law restricting marriage to opposite sex couples. The Ohio Senate did not take up H.B. 234.

33. In 2002, the Supreme Court of Ohio affirmed "that same-sex marriages are illegal in Ohio." *In re Bicknell*, 96 Ohio St. 3d 76, 2002 Ohio 3615, ¶14.

34. In September 2003, Ohio Representatives Bill Seitz, Thomas Brinkman and 41 of their colleagues co-sponsored H.B. 272. (Exhibit D). H.B. 272 mirrored failed H.B. 234. The Preamble to H.B. 272 identified the drafters' intent "to specifically declare that same-sex marriages are against the strong public policy of the state" and

"to declare that the recognition or extension by the state of the specific statutory benefits of legal marriage to nonmarital relationships is against the public policy of the state."

35. Section 1 of H.B. 272 proposed to achieve these objectives by adding the following language to the Ohio Revised Code:

    a. §3101.01(A) providing that "a marriage may only be entered into by one man and one woman;"

    b. §3101.01(C)(1) providing that "[a]ny marriage between persons of the same sex is against the strong public policy of this state" and "shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state;"

    c. §3101.01(C)(2) providing that "[a]ny marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state; and

    d. §3101.01(C)(3) providing that "recognition or extension by the state of the specific statutory benefits of a legal marriage to nonmarital relationships between persons of the same sex or different sexes is against the strong public policy of this state" and that "[a]ny public act, record, or judicial proceeding of this state, as defined in section 9.82 of the Revised Code, that extends the specific statutory benefits of legal marriage to nonmarital relationships

between persons of the same sex or different sexes is void ab initio."

36. Section 3(B) of H.B. 272 further articulated the General Assembly's intent to "clarify that relationships that are intended as substitutes for marriage, including but not limited to 'civil unions' as provided for in ... [Vermont], will not be recognized in this state."

37. H.B. 272 is a class of legislation commonly known as a "Super Defense of Marriage Act," or "Super DOMA." H.B. 272 fits that classification because it far exceeded limiting marriage to same-sex couples by further outlawing recognition of same-sex marriages performed in other states and depriving gay and lesbian individuals and couples the right to petition the government for any alternative form of comprehensive, state-wide relationship recognition such as civil unions or domestic partnerships.

38. The Ohio House of Representatives considered H.B. 272 on December 10, 2003. (Exhibit E: H.B. 272 House of Representatives Consideration Transcript of Dec. 10, 2003. Cites to the transcript of the House deliberation are designated as "House TR.)"

39. In introducing the legislation, primary sponsor Representative Bill Sietz acknowledged that "Ohio law already limits marriage to a man and a woman." House TR, p. 2. Rep. Seitz argued, however, that the legislation was necessary to prevent the Supreme Court of Ohio from rendering a decision similar to the Massachusetts decision of *Goodridge v. Dept. of Health*, or from holding that Ohio must recognize same-sex

marriages that are valid in other states and countries. House TR, pp. 3-6.

40. Co-sponsor Representative Ron Young stated that the legislation was critically important because "we're talking about a divine institution that's been given to us by God," and that "males and females coming together in traditional marriage create the basic unit, the building blocks of our society." House TR, p. 28-29.

41. Representative Young claimed that "scientific evidence" showed that children of married partners "tend to be healthier," are "more creative," "do better in school," and are "less involved in crime." House TR, p. 29. Young further claimed that "[m]arried spouses tend to be happier, healthier, wealthier than their counterparts." House TR, p. 29.

42. A number of members of the House Representatives spoke against H.B. 272 during the December 10, 2013 floor debate. They presented arguments that Ohio should respect marriage as a fundamental right for all as established in cases like *Loving v. Virginia*, that the concept of opposite sex marriage preserved primarily to protect procreation was an outdated view, that children of same-gender parents should not be treated disadvantageously compared to their peers being raised by heterosexual due to the state's failure to recognize their parents' relationship, that the possibilities of allowing civil unions or domestic partnerships for same-sex couples should be further explored and not excluded by this bill.

43. Representative Chris Redfern observed, for example, that "[g]ays and lesbians are a part of every Ohio family," and that "[t]hey should not be shortchanged in their efforts to better their lives and their communities." House TR, p. 42. Representative Redfern reported that as he discussed the bill in committee with colleagues, topics such as the potential impact of recognizing same-sex marriages on Ohio's pension funds were "certainly not a question of dollars and cents," but rather "a question of casting judgment upon others, criticizing one's life and livelihood and the way...they raise their children." House TR, p. 42.

44. Representative Peter Ujvagi confirmed that "anyone who attended any of the hearings ... knows the level of intolerance that was presented" to support this legislation. House TR, p. 52. (As is typical of Ohio legislative history, no official records exist of the Ohio House committee meetings in which H.B. 272 was discussed).

45. Representative Dale Miller agreed with Representative Ujvagi's observation that the legislation was "not about the defense of marriage," because "a homosexual couple is in no way a threat to my marriage, nor ... a threat to anybody else's marriage." House TR, p. 49 (Miller); pp. 51-52 (Ujvagi). Representative Miller also rejected the contention that sexual orientation is a matter a choice, and urged that "to pretend that these people don't exist or should be treated as second-class citizens is plain wrong." House TR, p. 51.

46. Representative Joyce Beatty discussed how the "tradition" of marriage had changed from the time when women had to give up their teaching jobs

and other professional activities to get married, and from when interracial marriage was outlawed. House TR, p. 55. She also pointed out that same-sex partners aren't "asking for a free ride" but rather equal treatment for doing "the same things we do," and further noting that passage of HB 272 "would immediately adversely affect over a quarter of a million" gay and lesbian Ohioans. House TR, p. 56.

47. Following the floor discussion Ohio's House of Representatives approved Ohio's Super DOMA by a vote of 69-23.

48. Prior to the Ohio Senate's consideration of H.B. 272, another Ohio court confirmed that Ohio had always restricted marriages to opposite sex couples, and provided further evidence that Ohioans need not fear a different interpretation of Ohio law by "activist" judges. *In re Application for Marriage License for Nash and Barr*, 11th Dist. Nos. 2002-T-0149 and 2002-T-0179, 2003-Ohio-7221 (Dec. 21, 2003), ¶30 (holding that "Ohio ... has a clear public policy that authorizes and recognizes marriages only between members of the opposite sex.").

48. Senators Bill Harris, Louis W. Blessing, Ronald Amstutz, John Carey, Jim Jordan, Lynn Wachtmann, Lynn Padgett and Jay Hottinger served as the sponsors of H.B. 272 in the Ohio Senate. For reasons questioned by other senators (*see, e.g.*, House TR, p. 58), H.B. 272 was referred to the Senate Finance and Financial Institutions Committee rather than the Judiciary-Civil

Justice Committee,[1] the Committee to which previous efforts to amend Ohio's marriage statutes, including S.B. 240, had been referred.

49. The 13-member Senate Finance Committee was heavily populated by H.B. 272 sponsors. Senator Harris chaired the Committee. Senator Carey was vice chair. Senators Blessing, Amstutz, Padgett and Hottinger were also members of the committee.

50. Senator Bill Harris, chair of the Finance Committee, issued a notice on Thursday, January 15, 2004 that the committee would hold a hearing on the legislation on Tuesday, January 20. The 5-day notice period included a three-day weekend due to the Martin Luther King Jr. holiday.

51. During a marathon hearing that started at 1:10 p.m. and concluded at 9:57 p.m. on January 20, 2004, committee members heard from 30 witnesses. Senator Eric Fingerhut estimated that "maybe three members of the majority [Republican Senators] and three members of the minority [Democratic Senators] heard most of the testimony."

52. The short notice and format of the hearing were unusual as Senate committees commonly hear the testimony from the legislation's sponsors, proponents and opponents on separate days. *See* Statement of Senator Eric Fingerhut in Exhibit F: House Bill 272 Senate Amendments and Consideration Transcript January 21, 2004, at p.

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[1] This Committee is now known as the Civil Justice Committee.

60. (Subsequent cites to the deliberation by the full Senate are designated as "Senate TR.")

54. As previously noted, Ohio does not retain an official legislative history of House or Senate committee hearings. News reports, however, indicate that the testimony was at times contentious, and featured claims from proponents that the bill was necessary to prevent Ohio from being an "enabler" of homosexuality and to protect churches from being forced to perform same-sex marriages.

55. The Senate Finance Committee approved Ohio's Super DOMA in the morning of January 21, 2004, recommending two amendments. The first added language that the bill's limitations on the extension of statutory benefits of legal marriage to non-marital benefits were inapplicable if those benefits were part of a collective bargaining agreement. The second clarified that a common law marriage from another state or nation would continue to be recognized as valid only if it were otherwise valid under the bill – that is, only common marriages of opposite sex couples would be recognized. (Both prior to and after enactment of Ohio's Super DOMA, Ohio only recognized common law marriages that were formed in this state prior to October 1991 and those recognized as valid in other states and countries.)

56. The Ohio Senate debated and passed Sub. H.B. 272 on the same day that its Finance Committee approved the legislation.

57. During the January 21, 2004 debate, Senator Harris argued for the "need" for the legislation on the grounds used by Representative Seitz in the

House, i.e., that same-sex relationship recognition would be forced on Ohio if it did not amend its statutory language to more clearly limit marriage to one man and one woman and reject the possibility of other forms of relationship recognition such as civil unions. Senate TR, pp. 2-3.

58. Other senators urging passage of the Super DOMA warned that the specter of same-sex marriage was inevitably intertwined with the recognition of polygamy, that churches shared responsibility with the government to regulate marriage, and that heterosexual marriages provide a superior environment for raising children. *See, e.g.,* Senator Jordan Senate TR pp. 78-82; Senator Jacobson Senate TR pp. 137-38.

59. Senator Jacobson took a leading role in defending the proposed legislation. He explained that proponents of Ohio's super DOMA viewed the legislation as "a recognition that marriage between a man and a woman is the only relationship in which children can be created, and, if they're faithful to it, no other children can be created outside of that marriage ...." Senate TR p. 138. Senator Jacobson stated that the legislation would not interfere with "the way adults choose to order their lives" because "[a]dults can form household relationships" after the legislation passed even though those relationships "don't have all the bells and whistles, "[p]erhaps don't have all the opportunities," and do not appear "equal to everyone else's." Senate TR p. 137. Senator Jacobson further opined that "children deserve that best opportunity and we are going to help children in whatever situation they are raised in," but "that does not mean to say that

because two people would like to order their lives in a certain way we have to change the institution of marriage just to make them feel better about their choices." Senate TR p. 139. While some people he knew had made choices to form households in which they "are working very hard to raise loving children in a loving environment," Senator Jacobson stated that the existence of such households "does not mean to those of us who are voting yes [on H.B. 272] that we have to do something to marriage to make marriage less in order to let those people do the best they can." Senate TR p. 139.

60. Other Senators questioned the need for the legislation and its true purpose, especially in light of its Super DOMA status. In rejecting the "need to defend marriage" argument, Senator Goodman urged that "... we don't really need to defend ourselves ... from people who are different than us." Senate TR p. 3. By passing this legislation, Senator Goodman said, "we're pointing fingers at others, and that's not what we ought to be doing. We ought to be looking at ourselves and trying to be better parents and better husbands and better wives. And that is the way you defend marriage." Senate TR p. 41.

61. Senator Brady cautioned that "whether you intended it or not, this is bigoted legislation. ...and that is the way it will be seen in history." Senate TR p. 57.

62. Noting that Ohio law already restricted marriage to opposite sex couples, Senator Dann stated that the "only possible reason for passing this bill, and doing it so quickly today, in light of the state of the union and in light of the political statements that

have been made around this country, is politics." Dann predicted that the vote would perhaps win the bill's proponents another election or two, "[b]ut the price for that victory is going to be the extension of hate throughout the state of Ohio. ... And everybody who reads this bill and people affected by it are going to suffer from that hate." Senate TR p. 74-75.

63. Senator Fedor cautioned that the legislation would result in some of Ohio's children growing up and being labeled and judged, and that "some of us legislators may be sending [the message] that our priorities are hate, exclusion, and discrimination." Senate TR p. 77.

64. Senator Zurz observed that Ohio's existing marriage law restricted marriage to a man and a woman, and that legislators should be more concerned about the law allowing a 16-year old girl to marry rather than prohibiting same-sex marriage. Senate TR p. 83. Senator Zurz characterized the legislation as motivated by politics rather than being a valid step to protect marriage, further stating that the legislation "hasn't been given enough time, it hasn't been given the thoughtfulness that it should have been given, and we are discriminating against people, and I really don't think that's what we came here to do." Senate TR p. 85.

65. Senator Prentiss urged her colleagues to vote against H.B. 272, stating that "[t]his bill is not progress; it's discrimination, good old fashioned discrimination." Senate TR p. 90. She further argued: "This bill is about the lack of acceptance of some by others. It embodies a mean spirit, nonpluralism, nonpluralistic attitude that says,

my way or no way, This bill imposes one set of values not held by all ...[in] Ohio without regard to diversity and ... without regard, even, to the U.S. Constitution which requires equal treatment for all." Senate TR p. 94.

66. Senator DiDonato, who supported limiting marriage to opposite sex couples, opined that H.B. 272 had crossed a line by denying benefits and "hurting others," as well as fast tracking the bill through the legislative process without providing full opportunities for hearings and debate. Senate TR p. 105. "It's a shame [this bill] ... came to the floor," DiDonato said. "It's really a shame. It should never have come to this level, not in the style it did." Senate TR p. 111.

67. Attempts by Senators Fingerhut and Dann to limit the reach of H.R. 272 proved unsuccessful. Senator Eric Fingerhut argued that if the legislation's sole purpose was to protect marriage, then additional language prohibiting the extension of any of the benefits of marriage to same-sex couples was unnecessary and would cause significant confusion on the legal consequences of private employers seeking to extend benefits to same-sex couples. Senate TR p. 12-18. His amendment to remove the extraneous language failed by a vote of 18 to 15. Senate TR p. 122. The Senate also rejected by an 18-15 vote the amendment proposed by Senator Dann to allow unmarried public employees to take bereavement leave following the loss of a partner, a benefit that was (and is) granted to married employees. Senate TR p. 43.

68. The Ohio Senate passed H.B. 272 by a vote of 18-15 and returned the legislation to the House with

the two amendments recommended by the Senate Finance Committee. As noted previously one amendment clarified that any common law marriages recognized in Ohio must be between one man and one woman, and the other stated that the legislation would not affect the rights of public sector employees to bargain over the terms and conditions of their employment.

69. On February 3, 2004, the House approved Substitute H.B. 272 by a vote of 72-22.

70. Ohio's Super DOMA was signed into law by Governor Bob Taft on February 6, 2004, and became effective on May 7, 2004.

71. Despite the law's denial not only of marriage to Ohio's same-sex couples but of all forms of legal relationship recognition including civil unions and domestic partnerships, Governor Taft denied any exclusionary impact or discriminatory intent of the legislation. In a statement released when he signed the bill into law, Taft said that "[f]irst and foremost, this is not a law of intolerance. I do not endorse, nor does this law provide for, discrimination against any Ohio citizen." Rather, Governor Taft claimed that the legislation was necessary "to reaffirm existing Ohio law with respect to our most basic, rooted, and time-honored institution: marriage between a man and a woman. Marriage is an essential building block of our society, an institution we must reaffirm. At a time when parents and families are under constant attack within our social culture, it is important to confirm and protect those environments that offer our children, and ultimately our society, the best opportunity to thrive." (Exhibit

G: Gov Taft Statement on Signing Ohio DOMA on February 6, 2004.)

72. For obvious reasons, many people in Ohio and elsewhere – and certainly gay and lesbian Ohioans – vehemently disagreed with the claims asserted by Governor Taft and other Ohio super DOMA supporters that the changes to Ohio law were not discriminatory in intent or in operation. The exact opposite conclusion is supported by the unequivocal nature of existing Ohio law limiting marriage to opposite sex couples, the legislation's sweeping prohibitions against *any* meaningful form of relationship recognition for same-sex couples, the negative comments about the allegedly disastrous impact on society if gay and lesbian couples were allowed the civil rights accompanying marital status, the refusal of legislators to consider the compelling statements made by fellow legislators about the impact of this legislation on gay and lesbian Ohioans, and the manner in which Ohio's super DOMA was fast-tracked through the Ohio General Assembly. Ohio's super DOMA was intended to, and does, disenfranchise gay and lesbian individuals and couples due to the animus of the Ohio legislators who voted for the legislation and the governor who signed the bill into law.

73. The animus that fueled the fast-track passage of Ohio's super DOMA intensified rather dissipated following enactment of the legislation, resulting in passage of the Ohio constitutional amendment discussed below.

Animus Resulting in Passage of Ohio Constitutional Amendments Denying Recognition of Same-Sex Marriages

74. In theory, the ballot initiative process gives all citizens an equal opportunity to shape the laws that govern their lives and that of their fellow citizens. In reality, ballot initiatives have become a favorite tool of special interest groups who seek to disenfranchise minorities. This type of "direct democracy" readily lends itself to abuse because the language and impact of the legislation and constitutional amendments submitted by special interest groups to voters are often ambiguous and designed to exploit the majority's ignorance about and fear of minorities.

75. Anti-equality advocates utilized Ohio's ballot initiative process to enshrine discrimination against gay and lesbian couples in Ohio's constitution in 2004. Throughout their constitutional amendment campaign, proponents grossly misrepresented the lives of lesbian and gay couples and their children and the impact of the proposed amendment on those families. Proponents also understated their intention to use the amended constitution (a) to dismantle the modest existing benefits and rights lesbian and gay individuals and couples have worked for many years to obtain in Ohio, and (b) to prevent members of this minority group from achieving any form of relationship recognition in this state.

76. The proposed Ohio constitutional amendment set forth as Issue 1 on the November 2004 ballot read: "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. The state and

its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

77. As is clear from the expansive text, the amendment not only forbids same-sex couples from marrying, but also prohibits them from seeking comprehensive forms of relationship recognition such as civil unions or domestic partnerships at a local, regional or statewide level.

78. Citizens for Community Values (CCV), a not-for-profit corporation based in Cincinnati, Ohio, was the primary sponsor of Issue 1. Phil Burress was president of CCV and served as chairman of the Ohio Campaign to Protect Marriage (OCPM), the political action committee controlled by CCV. CCV's attorney David R. Langdon is credited with authoring the text of the amendment.

79. CCV's campaign to communicate misinformation about gay and lesbian individuals and couples found nationwide support from other anti-equality groups including Focus on the Family, Family Research Council, National Coalition for the Protection of Children and Families, American Values, and the Liberty Counsel. (*See, e.g.*, Exhibit H: Burress 2-26-04 Memo re CCV and Coalition backing federal constitutional amendment banning same-sex marriage.)

80. CCV's publications on its web site and its extensive advertising campaign urging voters to support Issue 1 left no doubt as to its hostility toward homosexuals. In a four-page document titled "The Homosexual Issue" Where do we

Stand? And Why?," CCV proclaimed that the organization opposed "the inherent dangers of the homosexual activists' agenda—dangers both to society and to the individual." (Exhibit I: CCV, "The Homosexual Issue" Where do we Stand? And Why?" from CCV website Aug. 8, 2004.)

81. "The Homosexual Issue" articulates CCV's core principle that "homosexual identity must be based exclusively on sexual behavior, referring to oral and/or anal sodomy practiced with members of the same sex" because "It is that specific behavior which they claim qualifies homosexuals for special rights and "minority status."

82. "The Homosexual Issue" further identified the "inherent dangers of the homosexual activists' agenda" as:

    a. Violating the Judeo-Christian teaching that the marriage defined as "one woman and one man living together in a lifelong, monogamous, covenantal relationship," a "teaching [that] is grounded in Scripture, and the truths of Scripture are absolute and are not subject to change;"

    b. Departing from "God's intention for human sexuality, including not only homosexual behavior, but also rape, incest, pedophilia, premarital sex, adultery, bestiality, pornography and any other sexual expression outside this Scriptural norm;"

    c. Ignoring nature's confirming of "the Scriptural sexual ethic," i.e. that only "[o]ne man and one woman have the ability to express their love in a true, complete

physical union," resulting "in life-giving procreation;"

d. Recruiting "men, women and children into this destructive lifestyle;"

e. Causing "destructive outcomes associated with homosexual behavior" including "AIDS, a much higher incidence and risk of sexually transmitted diseases, approximately three times the risk of alcoholism and drug abuse, a significantly higher rate of domestic violence and promiscuity, and a shortened life span;"

f. Rejecting conversion therapy as a viable alternative when "thousands of people have overcome this desire, have withdrawn from homosexual behavior and have gone on to enjoy fulfilling heterosexual relationships;"

g. Establishing "gay and lesbian organizations in our schools," with the purpose being "to train gay and lesbian students for activism and to encourage 'straight' students to experiment with homosexual behavior as defined above," and often resulting in "homosexual role playing;" and

h. Seeking "special rights for homosexuals" in an effort "to attain complete social acceptance of homosexual behavior."

83. CCV concludes its "The Homosexual Issue" by denying that gay and lesbian individuals and couples suffer any legal, economic or social disadvantages. It states: "Persons who practice homosexual sodomy do not demonstrate any of the characteristics that identify disenfranchised

classes. They are not discriminated against in any of the ways considered essential by the courts—economic status, educational opportunity or political representation. In fact, the level of education and the average income of homosexuals are considerably above the average education and income for the population in general. A study of their movement shows that they clearly enjoy all the legal rights and privileges of other citizens."

84. CCV also shipped its misinformation about homosexuality to public school boards and superintendents in Ohio, advising them – incorrectly – that by adopting policies aimed at protecting lesbian and gay students from harassment and physical attacks, school officials put themselves and their school districts at risk of criminal and "daunting" civil liability. In a letter to the superintendent of Cincinnati City School District, for example, CCV President Phil Burress warned that "by allowing access by homosexual activist organizations, and by establishing policies that have the effect of normalizing homosexual behavior, schools and/or their employees may be liable for physical, emotional, or criminal harm to the students entrusted to their care." Burress claimed that the efforts of national and local groups advocating for safe schools policies "is nothing more than a deceptive ploy to encourage sexual behaviors that are always unsafe, and sometimes illegal." Burress also falsely reported that these groups endorsed and encouraged adult-child sexual relationships and same-sex sexual behavior among students, resulting in "numerous negative physical and emotional consequences directly related to same-sex behavior." (Exhibit J

– CCV's Legal Liability Letter to Schools May 2003).

85. In its "Facts About Issue 1" publication, CCV continued to mislead Ohio voters about the need for Issue 1. It stated – falsely – that marriage equality advocates sought to eliminate age requirements for marriage, advocated polygamy, and sought elimination of kinship limitations so that incestuous marriages could occur.

86. CCV's "Facts About Issue 1" also drew readers' attention to a "White Paper" authored by the "Corporate Resource Council" claiming – again falsely – that employers who have non-discrimination policies for gay and lesbian employees expose themselves to "significant legal problems" including failing to conform to federal law requiring employers to protect against "a sexually hostile work environment" and failing to "accommodate religious beliefs." This paper also falsely reported that health benefits for same-sex couples are much more expensive than for heterosexual couples that "[s]exual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span." (Exhibit L: Corporate Resource Council White Paper on costs of domestic partner benefits).

87. In addition to the vituperative anti-gay rhetoric distributed through its webpage and direct mail, CCV (through its political action committee OCPM with support from allies including Focus on the Family) spent more than $1.1 million conveying their distorted messages about the lives of gay and lesbian Ohioans and their children.

Then Ohio Secretary of State J. Kenneth Blackwell – Ohio's chief election officer and honorary co-chair of President George Bush's Ohio re-election campaign – lent his support to the anti-equality crusade by doing radio and television advertisement urging voters to amend Ohio's constitution to deny marriage and all other forms of relationship recognition to same-sex couples in Ohio. (Exhibit M: Media Blitz Begins for Ohio Issue 1 (10-26-04)).

88. OCPM's television and media campaign supporting passage of Issue 1 included misleading statements from Mr. Blackwell such as "[w]e won't have a future unless [heterosexual] moms and dads have children," and that [e]very major social science study tells us time and again: families are stronger with a wife and a husband; children do better with a mother and a father." (Exhibit N: Transcripts of Radio and TV advertisements supporting Issue 1).

89. OCPM reportedly placed phone calls to 3.3 million Ohio households in which a recording of Secretary of State Ken Blackwell urged voters to approve the amendment. (Exhibit M: Media blitz begins for Ohio's Issue 1).

90. Multiple misrepresentations contained in OCPM's print advertisements supporting Issue 1's passage bear evidence of animus toward gay and lesbian Ohioans. In print advertisements titled "CommonSense" and "PrivateLife," OCPM misrepresented social science findings about the mental and emotional health of same-sex couples and their children, ignoring the substantial science then available. The advertisements also stated falsely that passage of Issue 1 would have

no impact on benefits "unmarried couples" received from employers, even though the backers of Issue 1 had publicly stated that the amendment would prevent public employers from continuing to offer such benefits and had pledged to challenge domestic partner benefits offered by Ohio State University and other public entities as soon as the amendment passed–a promise they made good on. The "Common Sense" advertisement also suggested that polygamous marriage would inevitably follow recognition of marriage by same-sex couples. (Exhibit O: "Common Sense" Advertisement; Exhibit P: "Private Life" Advertisement).

91. Misleading arguments on the necessity of the amendment are also found in Issue 1 supporters' explanation of the amendment contained in the official Ohio Issues Report for Issue 1 published by the Ohio Ballot Board, a Board chaired by Secretary of State Blackwell. This language explains that the amendment "excludes from the definition of marriage homosexual relationships and relationships of three or more persons," thus breathing more life into the nonexistent threat of polygamy. (Exhibit Q: Ohio Issues Report for Issue 1).

92. The misinformation CCV and its allies communicated to the public to ensure passage of Issue 1 were grounded in stereotypes of gay men and lesbians that had long been disproven by medicine, science, other disciplines, and common experience.

93. By 2004, numerous studies by social scientists, medical and mental health professionals, economists, and other credible experts in various

disciplines documented that gay and lesbian people were, just as their heterosexual counterparts, multi-faceted individuals who could not be defined based upon sexual behaviors in which they may or may not engage.

94. By 2004, credible sources confirmed that gay and lesbian couples were procreating and raising children who were as healthy and well-adjusted as heterosexual couples.

95. By 2004, credible economic analyses repeatedly confirmed that neither same-sex couples nor gay and lesbian individuals were economically advantaged.

96. By 2004, credible legal scholars and practitioners documented that local, state and federal laws and policies bestowed no "special rights" on gay men and lesbians and their children. Rather, the laws continuously placed gay and lesbian couples and their children at a substantial disadvantage compared to heterosexuals.

97. By 2004, characterizations of lesbians and gay men as mentally or emotionally unbalanced or as sexual predators who recruited children and others into their "lifestyle" had been soundly disproven by credible science and common experience.

98. By 2004, all credible studies of gay men and lesbians concerning the depression or anxiety experienced within this population traced the cause of their emotional distress to the hostility and hatred of groups like CCV and its affiliates directed at homosexuals, rather than any innate condition related to sexual orientation.

99. By 2004, conversion therapy had been rejected by the esteemed American Psychiatric Association (APA) and all other credible medical professionals due to its ineffectiveness in changing a person's sexual orientation and the significant harms imposed on those subjected to it.

100. By 2004, public schools were beginning to enact antidiscrimination policies, but not to privilege gay and lesbian students or to promote any type of sexual behavior. Rather, schools were begrudgingly enacting these policies in reaction to increased and often brutal attacks on non-gender conforming students and to lawsuits in which victims proved that the indifference or hostility of school officials toward gay and lesbian students encouraged the attacks.

101. By 2004, bullying of school-age children and brutal physical assaults on gay and lesbian adults were (and continue to be) inspired by the continuous recitation of false and distorted information about gay men and lesbians by organizations like CCV and the individuals and other groups associated with CCV.

102. In sum, the proponents of Issue 1 successfully portrayed gay and lesbian individuals and couples in Ohio as an evil dragon poised to destroy all that is good and decent in society, and then promoted Issue 1 as the only appropriate weapon for slaying that dragon. But as the case with all dragons, the one created by CCV and its allies was then – and remains today – a mythical creature. The degree of animus displayed by CCV and other Issue 1 backers in perpetuating this myth is strikingly similar to the animus employed to secure the passage of Colorado's Amendment 2, the state

constitutional amendment that the U.S. Supreme Court declared unconstitutional in *Romer v. Evans*, 517 U.S. 620 (1996). Unlike Amendment 2, however, Article XV, §11 of the Ohio constitution continues to inflict significant injury, as it is routinely invoked by CCV and like-minded individuals and organizations to try to reduce even further the few legal rights and benefits that gay and lesbian Ohioans enjoy.

Conclusion

103. Ohio law banning the recognition of same-sex marriages celebrated in other states creates two distinct and inherently unequal Ohios. Opposite-sex married couples and their children live in the Ohio that automatically bestows more than one thousand state and federal rights, benefits and privileges on them. Same-sex married couples and their children live in the Ohio that automatically denies most state and federal rights, benefits and privileges to them. Since 2004, the inequality enshrined in Ohio law extends far beyond the denial of marriage per se, as Ohio statutory and constitutional provisions deny same-sex couples even the opportunity of seeking *any* type of relationship recognition "that intends to approximate the design, qualities, significance or effect of marriage." This leaves gay and lesbian couples who wish to formalize their commitment to each other with a single option: be married in another state. Ohio's refusal to recognize the out-of-state marriages of its gay and lesbian citizens, especially when the state provides no other form of relationship recognition, is firmly grounded in the historic and contemporary animus directed at gay and lesbian Ohioans.

Signed under penalty of perjury this 10th day of October, 2013.

/s/ Susan J. Becker
Susan J. Becker

EXHIBIT H

[LOGO] Citizens for Community Values
8/14/2013 9:34 AM WEBPAGE

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CCV PERSPECTIVE

A Publication of Citizens for Community Values
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TO: Friends of CCV
FROM: Phil Burress, President
DATE: February 26, 2004
RE: National Ad Campaign Supports Marriage Amendment

On February 24th CCV's president Phil Burress joined 80 other pro-family and evangelical leaders in signing a letter to President Bush thanking him for his courage in endorsing a constitutional amendment to protect the sanctity of one man/one woman marriage in the United States.

On Sunday, February 29th, that letter will appear as a full-page ad in 26 of the nation's highest-circulation newspapers, including USA Today, the Wall Street Journal, New York Times, Los Angeles Times, Chicago Tribune, Boston Globe, and in Ohio, the Cincinnati Enquirer, The Columbus Dispatch,

and the Cleveland Plain Dealer. Together, the 26 papers will reach an audience of 18 million families.

"Unfortunately," explained Burress, "much national media attention has been given to a small group of activists who are misrepresenting the president's responsible action as 'bigoted' and 'discriminatory.' We wanted our elected representatives and the president to know that 'we the people' are opposed to letting a few activist judges make a mockery both of the most sacred, enduring and fundamental institution of our society and of our representative form of government, itself."

The letter, in-part, applauds the president for his courage:

"There have been times in our history when presidents have been called upon to make difficult decisions to protect the balance of power in our government. Abraham Lincoln did this when he refused to recognize the Constitutional precedent of the Supreme Court's bred Scott decision. We think you are making just such a stand in opposing what we view as runaway courts. Thank you, sir, for standing with the **people** ***and for doing what is right."***

In addition to Burress, leaders signing the letter include Dr. James C. Dobson of Focus on the Family, Chuck Colson, Tony Perkins of Family Research Council, Coral Ridge Ministries' Dr. D. James Kennedy, Richard Land of the Southern Baptist Convention, Rick Schatz of National Coalition for the Protection of Children and Families, Gary Bauer

of American Values, Jack Stone of Church of the Nazarene, and Liberty Counsel's Matthew Stayer.

The 80+ leaders personally pledged to support the president in educating the public about the truth of traditional marriage and the necessity of a constitutional amendment to protect it.

"[We] will do everything in our power to inform and educate our constituents about the importance and urgency of this issue both for the preservation of the family in America as well as the right ordering of our government. We will speak on behalf of and to our communities encouraging their fullest participation in what must be a great national debate to preserve the sanctity of marriage and representative government."

The letter ends with a call to action: ***"Please join President Bush and millions of your fellow citizens in support of the federal marriage amendment. Call your Senators and Congressman today and urge them to vote FOR the Federal Marriage Amendment."***

U.S. Senators and Congressmen can be reached through the capitol hill switchboard number at 202-224-3121. To find specific contact information for YOUR elected representatives in the U.S. House and Senate, click here or on the Vote Smart box in the left margin. You can also type http://www.vote-smart.org directly into your Internet browser and then enter your zip+4 into the search.

To view the ad as it will appear in 26 newspapers this weekend, click here.

CCV is working hard to promote Judeo Christian moral values in Ohio and across the nation. Please consider supporting our work with a tax deductible gift through our online secure connection.

CCV Perspective
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EXHIBIT I

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"THE HOMOSEXUAL ISSUE" WHERE DO WE STAND? AND WHY?

Recently a genuine friend of CCV asked this honest, albeit alarming question: "Why is CCV against homosexuals?" She explained, "I support your position on pornography, on indecent broadcasting, on strip bars, on all those things. But why do you attack the homosexuals? Shouldn't we defend their rights? We may not agree with their lifestyle. But how are they harming us?"

Inquiries such as the above created awareness among the staff of CCV that we, the staff, had assumed, incorrectly, that all the citizens whom we represent understood our position with respect to homosexuality and the agenda of homosexual activists. Resting on that incorrect assumption, we had failed to communicate clearly that position. This paper is an attempt to do exactly that—to articulate and explain the position of CCV with respect to homosexual behavior, our relationship to those who engage in homosexual behavior, and the campaign or agenda of homosexual activists.

REACHING OUT

First, CCV definitely is not "against homosexuals," those who practice homosexual behavior. We know that homosexual behavior is destructive to the individual and sincerely reach out to assist those individuals caught up in this behavior. Further, while disagreeing with the behavior, we firmly believe that those individuals are entitled to all the

rights and freedoms offered to citizens of this community, state and nation. Compassion, respect and sensitivity mark our relationship to those trapped in this behavior.

On the other hand, we believe that the campaign, the militant agenda, of homosexual activist organizations threatens the emotional and physical health, indeed, the very life, of those trapped in such behavior. That agenda also represents one of the greatest threats to our traditional Judeo-Christian family values, and to societal stability as a whole, of our generation. We want all our supporters to understand the facts supporting these beliefs.

THE MORAL ISSUE

The primary focus of this paper will be the inherent dangers of the homosexual activists' agenda—dangers both to society and to the individual. It is those dangers that compel us to react in opposition to that agenda. However, we would be remiss if we did not first address briefly the more basic issue of the morality of homosexual behavior.

One of the primary tenets upon which this organization was established is the Judeo-Christian teaching that the family is the cornerstone of civilization. Inseparably linked to that tenet is the belief that marriage—i.e., one woman and one man living together in a lifelong, monogamous, covenantal relationship—is the foundational element of the family unit. Compromise the integrity of the marriage relationship, and you compromise the integrity of the family.

Some have reasoned that this "Judeo-Christian" teaching is based upon tradition, and that as the needs of societies change, adherence to tradition alone should not prevent us from adapting our traditions to changing needs and mores. But this teaching is grounded in more than tradition. This teaching is grounded in Scripture, and the truths of Scripture are absolute and are not subject to change.

Both the Old and New Testaments clearly state God's intention for human sexuality: the monogamous, lifelong sexual union of one man and one woman. Any departure from that Divine order is a distortion of God's intention for human sexuality, including not only homosexual behavior, but also rape, incest, pedophilia, premarital sex, adultery, bestiality, pornography and any other sexual expression outside this Scriptural norm.

We do not here even address the many instances in both Testaments where homosexual behavior specifically is condemned. Repeatedly, relativistic screens have been thrown over those passages and their meaning has become distorted through numerous debates. We do not believe that such passages are any less meaningful or clear in their condemnation of homosexuality, but we also do not feel that they are crucial to the argument. By far the most convincing condemnation of homosexual behavior is the affirmation throughout the Scriptures of the Creator's intended design for human sexuality.

Nature also affirms the Scriptural sexual ethic. One man and one woman have the ability to express their love in a true, complete physical union. That union, alone, results in life-giving procreation.

THE THREAT TO THE INDIVIDUAL

Quite apart from our moral objection to homosexual behavior, compassion—genuine compassion—compels us to reach out to those individuals involved in homosexual behavior and to resist those activists who seek to draw men, women and children into this destructive lifestyle.

The destructive outcomes associated with homosexual behavior are numerous and they are well documented. Those destructive outcomes include AIDS, a much higher incidence and risk of sexually transmitted diseases, approximately three times the risk of alcoholism and drug abuse, a significantly higher rate of domestic violence and promiscuity, and a shortened life span.

How can this be? How can attraction to the same sex result in such devastating outcomes? In discussing "homosexual behavior" we must not allow ourselves to politely sidestep the ugly, straightforward facts. "Homosexual behavior" is not simply "feelings of warmth" toward members of the same sex. Specifically, by "homosexual behavior" we are referring to **oral and/or anal sodomy practiced with members of the same sex**. When "homosexual behavior" is thus accurately defined, homosexual activists, in order to cloud this ugly truth, are quick to accuse their informed opponents of being "caught up in the sexual aspect" of homosexuality. The undeniable fact is—that practice is primarily what constitutes "homosexual behavior." Complete social acceptance of that very behavior is what these activists are promoting. It is that specific behavior which they claim qualifies homosexuals for special rights and "minority status."

Anal sodomy, the dominant homosexual behavior, is the most efficient means of transmitting Aids, the most lethal disease of our generation. It also is an efficient means of transmitting most other STD's. The promiscuity encouraged by those who practice such behavior intensifies the problem. Numerous, well-documented reports confirm the relationship between the emotional problems listed above and those who practice such behavior. All of this adds up to a significantly decreased lifespan.

Note the sharp contrast between such undeniable truths and the TV-sitcom portrayal of homosexual behavior. Note the even sharper contrast between these truths and the classroom discussions about homosexuality as an "alternative lifestyle," discussions in which our children are being forced to participate at an increasingly younger age.

It should be noted here also that homosexuality is not genetic. This false claim has been repeated so often and so loudly that a disturbing majority of the public has accepted it as truth. Absolutely no research supports this claim. To the contrary, thousands of people have overcome this desire, have withdrawn from homosexual behavior and have gone on to enjoy fulfilling heterosexual relationships.

THE THREAT TO SOCIETY

Even more alarming than the destructive effect upon the individual is the threat that the activists' agenda poses upon society as a whole. Again we repeat, the traditional family—one father, one mother, and their natural or adopted children—is the basic building block of society. Not just our

society, but society as a whole. The history of civilization proves that when a particular society strays from this norm, that society deteriorates.

Homosexual activists are not simply seeking acceptance of individuals who engage in homosexual behavior. Rather, the primary, clearly stated focus of their agenda is normalization, complete social acceptance, of homosexual relationships and the undermining of the traditional family. Just as we cannot stand by silently and watch individuals lured into a destructive lifestyle, we also cannot stand by silently and watch militant activists chip away at the very foundation of our cultural heritage and our Judeo-Christian belief system.

Statements such as the above evoke some basic questions and challenges that need to be addressed. Who are these "activists" to whom we repeatedly refer? What is this "agenda"? Is it really anything more than the contrivance of heterosexual, "right-wing" activists who are repulsed and/ or threatened by the presence of homosexual behavior in society?

Among others, these activists are the leaders and active members of the gay and lesbian clubs; the owners, editors and writers of the homosexual periodicals; and influential spokespersons, including many prominent actors and politicians. Their agenda involves a well-thought-out, cleverly executed and well-funded campaign to confuse and deceive the American public.

One of the most widely circulated homosexual campaign articles was first published in 1987 in the homosexual magazine *Guide*. It was titled *The Overhauling of Straight America,* and it contained a

literal blueprint for homosexualizing our culture and vilifying all who are opposed to the normalization of homosexual behavior. That plan has been embellished and enlarged. And that plan is working.

These well-organized activists have embellished that plan in numerous treatises published since that time, but they have never deviated from the two primary areas of attack set forth there. First, normalize the behavior. With the enlisted help of the mass media and the arts, among others, in an incredibly short period of time, homosexuality has come to be accepted by a majority of the public as an alternative behavior pattern rather than as a dangerous distortion of God's plan for human sexuality. Secondly, vilify the remaining opposition. All those who oppose and who would try to expose this deviation for what it is, have been depicted as villains—hate mongers, narrow-minded bigots, intolerant and unloving people. As a result of this successful tactic, the voice of compassion has been stifled.

One very important part of the homosexual activists' agenda is to raise the awareness of homosexuality, or simply stated, to talk about homosexuality frequently and loudly. In virtually every area of our lives, the homosexual activists have been successful in raising the homosexual issue. Every one of us has been forced to be a part of the argument regarding homosexuality and marriage; homosexuality and adoption; homosexuality and civil rights; homosexuality and minority status; homosexuality and the armed forces. The list goes on.

Consistently, in all of these areas, it is the minority position of the homosexual activists that

has been heard most clearly. To a degree, the reason for that lies in the pro-homosexual bias of the entertainment and news media. To a much larger degree, however, the reason lies in the fact that gay and lesbian activists have been able to silence criticism by defining any opposition to the disease of homosexuality as "homophobia." With this inflammatory, coined epithet, gays and lesbians have thrown anyone who expresses compassionate or personal disapproval of homosexuality into the same category as those who dislike, hate or harm those who engage in homosexual behavior.

Have they been successful? Results seem to say so. Many major corporations have succumbed and have granted "domestic partner" benefits, benefits traditionally reserved for married couples and their families, to homosexual partners and other non-traditional living arrangements. Employment discrimination laws now include "sexual orientation" in their language. Many cities, counties and municipalities have added "sexual orientation" to their anti-discrimination ordinances. More changes in the political and work-place arenas lie just over the horizon.

THE SCHOOL AGENDA

Of even more concern to the pro-family position than the unhealthy changes in these arenas, is the stronghold that has been established by gay and lesbian organizations in our schools. Powerful national organizations are behind the drive to homosexualize our schools—at the collegiate, secondary and even primary levels.

The most influential such organization, and a very well-funded one, is GLSEN—Gay, Lesbian, Straight Education Network. Among other activities, this group organizes homosexual clubs and "gay-straight alliances" in our schools. From information gained on GLSEN's own website, we know that GLSEN-sponsored clubs now exist in 19 school districts in the Greater Cincinnati area alone. The purpose of these clubs is to train gay and lesbian students for activism and to encourage "straight" students to experiment with homosexual behavior as defined above.

A sister organization is PFLAG—Parents and Friends of Lesbians and Gays—which encourages parents of students to volunteer for activism on homosexual issues. And reinforcing the efforts of these organizations are the ACLU and the NEA, the nation's most influential union and an organization that aggressively pushes homosexual issues in schools.

Nowhere has the drive to normalize homosexual behavior and silence opposition been more organized and more effectively orchestrated than in our schools. On a regular basis in public schools, under the guise of anti-bias or multi-cultural education, simple statements expressing disapproval of homosexuality for moral, religious or health reasons are categorized as "hate," "homophobia" or "discrimination." As a result, an environment has been created in which students, who have heard a different message at home or at their place of worship, have been forced to censor themselves. Eventually, the silent resistance weakens. Resignation follows. And then acceptance.

The drive to normalize homosexual behavior in our schools takes many forms and frequently is masked in positive, deceitful language. Many schools have adopted "non-discrimination" policies that single out "sexual orientation." Such policies have been used to label anything to which homosexual activists object, including too much emphasis on the traditional family or heterosexuality, as "discriminatory."

Recently, schools across the nation have been encouraged to adopt "anti-bias" or "safe school" policies. The language, "anti-bias" and "safe school," practically forbids opposition. Again, careful examination reveals the hidden agenda. The wording of these policies specifies "sexual orientation" and they have been used to associate all objections to homosexual behavior with "hate." Students place themselves at risk of disciplinary action simply for stating their faith-based views on homosexual behavior.

Federally-supported, required diversity or tolerance programs for students and teachers exist in most public schools—even at the elementary level. The lessons taught here equate acceptance of homosexuality with religious and racial tolerance. They portray traditional values, and those who hold them, as "hateful." Homosexual role playing frequently is encouraged.

Room does not permit us to elaborate on the many other avenues through which the homosexual message has infiltrated our schools. But we hardly have scratched the surface here.

The reason that the homosexual activists' agenda concentrates so heavily on schools is obvious. In the workplace and political arenas, some opposition to normalization of homosexual behavior still exists. With a well-executed agenda in our schools, that opposition will be non-existent in the next generation.

THE CIVIL RIGHTS APPROACH

One tactic used by homosexual activists to attain complete social acceptance of homosexual behavior is to seek special rights for homosexuals. By disguising their demands under the umbrella of the civil rights movement, they have been frighteningly successful. They compare "homosexuals" as a group to truly disenfranchised classes such as racial minorities and women. Many in the population have accepted that comparison without examining the legitimacy of the claim.

Persons who practice homosexual sodomy do not demonstrate any of the characteristics that identify disenfranchised classes. They are not discriminated against in any of the ways considered essential by the courts—economic status, educational opportunity or political representation. In fact, the level of education and the average income of homosexuals are considerably above the average education and income for the population in general. A study of their movement shows that they clearly enjoy all the legal rights and privileges of other citizens.

Civil rights laws have been enacted in our country in order to protect classes of people from discrimination based on status—on immutable, distinguishing

characteristics that have nothing to do with behavior. A person's race, for example, has nothing to do with that person's lifestyle or behavior patterns. To remove race as a criterion for social decision-making thus makes sense.

Homosexuals cannot be characterized by any such status, but only by their behavior, i.e., by the fact that they choose to practice sexual acts with members of the same sex. If the argument could be made that this behavior pattern qualifies for "civil rights" protection, the same argument could be made for innumerable "classes" of behavior, ranging from the most frivolous recreational preferences to repulsive, deviant sexual preferences.

By claiming the need for special protection, those who practice homosexual behavior are asking for rights that other citizens do not have. The homosexual activist desires to coerce others not to take into account the inclination of homosexuals to practice same-sex sodomy when they make decisions, even though those others—including employers, landlords, and parents—have a right to take this preference into account. Our courts always have protected such "legitimate discrimination" as a basic right. To give such special protection or privilege to homosexuals is to take away that basic right. There are legitimate, common-sense reasons for taking into consideration a person's sexual preference in making personal decisions, especially when that preference is associated with infections disease and emotional disorders.

To return to our friend's question, CCV is not "against homosexuals." However, we do not consider homosexuality an alternative lifestyle or even a

"sexual preference." We believe that homosexual behavior is unhealthy and destructive to the individual, to families, and thus to communities and to society as a whole.

Compassion compels us to reach out to support healing of individuals who have been drawn into the homosexual lifestyle. And healing is possible!

Statistics show that as a behavior pattern becomes more accepted by society, more people will be tempted to experiment with that behavior. Although the actual percentage of our population that would identify as homosexual still is less than 2% (nowhere near the 10% that homosexual activists claim) this percentage could change dramatically in the next ten to fifteen years if concerned, informed citizens do not actively resist the organized effort to normalize homosexual behavior in our society, especially in our schools.

At the outset of this paper we stated that the militant agenda of homosexual activists represents the single greatest threat to our Judeo-Christian family values, and to societal stability as a whole, of this generation. We hope that you understand our rationale for that statement and will join us in resisting, on every front, the organized effort to normalize homosexual behavior in our society.

EXHIBIT J

Citizens for Community Values
11175 Reading Road, Suite 103,
Cincinnati, OH 45241
Phone: (513) 733-5775 Fax: (513) 733-5794
Phil Burress, President

May 14, 2003

Mr. Alton L. Frailey:
Superintendent
Cincinnati City SD
2651 Burnet Ave PO Box 5381
Cincinnati, OH 45201

Dear Mr. Alton L. Frailey:

On April 9, 2003, the Gay, Lesbian, and Straight Education Network (GLSEN) sponsored student activities on about 2,500 school campuses across America. In Ohio, GLSEN claimed to be assisting in coordination of many events, mostly at the high school level. Their annual "Day of Silence Project" seeks to affirm homosexual, bisexual, and transgender youth by symbolically imitating the "silence" these students allegedly face every day.

Regardless of whether students or teachers at any of your schools participated in the recent events, we felt it necessary to write to you to express our concern that GLSEN's influence is growing on campuses all across the state. We believe their presence poses not only a significant risk to the health and well-being of your students, but also could very likely place your schools at a serious legal liability. Allow me to briefly explain.

Since the early 1990s, GLSEN and similar organizations have been working for greater access to public schools with the stated purpose of making them a "safer" place for young people who have become involved in homosexual behavior. GLSEN insists that self-identified homosexual students are regularly harassed, threatened and abused, creating an environment in which they cannot learn. Also promoting this idea is Parents, Families and Friends of Lesbians and Gays (PFLAG), which is also gaining a significant presence in many schools across the country.

What is becoming increasingly clear, however, is that despite claims to the contrary, the "safe school" message of these organizations is nothing more than a deceptive ploy to encourage sexual behaviors that are always unsafe, and sometimes illegal.

Exposure to and experimentation with homosexual behavior carries serious risks that school officials should be aware of in order to protect students. There is concern that by allowing access by homosexual activist organizations, and by establishing policies that have the effect of normalizing homosexual behavior, schools and/or their employees may be liable for physical, emotional, or criminal harm to the students entrusted to their care.

Most states have gone to great lengths to ensure the safety of children and to protect children from corruption by adults. Criminal laws that prohibit adults from contributing to the delinquency or corruption of minors often address areas of sexual behavior and carry harsh punishments.

In some instances, negligent failure to protect a child from known dangers when the child is in one's care can be cause for legal and/or criminal action. And when students are on school property, or under the care of school agents, the authorities at the school have a fiduciary responsibility to protect students from harm.

Although GLSEN, PFLAG and similar organizations are quick to assert that neither they nor the school clubs associated with them encourage adolescent sexual behavior, parents have found a completely different story when researching the resources and activities of these organizations.

Some of the most disturbing evidence is for and in the books and brochures recommended by these groups for young people and their parents. In her conclusion to a thorough analysis of these resources, Linda Harvey of *Mission: America* reports:

> "Children are often encouraged to be self-indulgent and self-centered in every aspect of life. They are told to reject the wisdom of parents and other authorities if they wish, even at early ages. And most alarming, they are given the green light to engage in just about any sexual behavior imaginable, even when it is criminal."

Implied approval of child-adult sexual relationships is a frequent and usually positive theme in resources recommended by GLSEN and PFLAG. Beyond the fact that these liaisons often constitute criminal activity for which the adults could be prosecuted, the civil lawsuits schools could face are daunting.

One has only to look to the numerous claims recently made against the Catholic Church for its various roles in sexual abuse scandals involving priests to see the liability schools could face in similar situations. Out-of-court settlements paid for past offenses have totaled in the multiple millions of dollars thus far.

It is difficult, if not impossible, for school officials to know whether the adults who want access to the children on their campuses have criminal intentions. But if those adults state their intentions in writing up front—in books and brochures approving of child-adult sex—school officials have a responsibility to keep them at a distance.

Failure to do so when the school is aware of the potential danger will very likely result in culpability.

According to Harvey,

> "School officials should be aware that many homosexual support groups for teens and their parents believe that sex between a young person and an adult is just an expected part of the growing up process. Numerous stories and episodes of adult-teen homosexual sex are found within the resources of these groups. Incidents are treated at times in a neutral fashion, or too often, in a positive light, as if such abusive relationships are natural, normal, and even an advantageous 'coming of age' step in the lives of 'gay, lesbian, bisexual and transgendered' youth."

Enclosed you will find two reports prepared by *Mission: America* containing direct quotes from materials often recommended and distributed by

pro-homosexual youth organizations. Please review them carefully.

Because homosexual behavior has been proven to contribute to many harmful consequences for those who engage in it, school officials should be aware that it is possible that a legal liability exists for the tort of negligence if it is proven that homosexual activist organizations were granted access to students under the school's responsibility and that students subsequently suffered physical or mental harm. Under the right circumstances, state authorities could also bring criminal proceedings. See Ohio Revised Code § 2907.04, 2919.22 and 2919.24.

It is hoped that your school officials who have been entrusted with the education and care of children will carefully consider the numerous negative physical and emotional consequences directly related to same-sex behavior. Examination should be made of the relationship schools in their district have with organizations such as GLSEN, PFLAG, or other local groups. And, an honest answer must be given to the tough question:

> **Have the programs and policies put in place – as a result of the encouragement or threats of these organizations, and the student alliances or clubs encouraged and/or supported by these organizations, – directly or indirectly exposed students to unreasonable risk?**

If the answer to the question is yes, then it is hoped that whatever action is necessary will be

taken to reverse the influence that these organizations have established in schools and on the formative minds of students.

We are aware that many schools across Ohio have already taken steps to protect students from organizations and materials that could endanger them. We believe many parents are supportive of these actions. As previously stated, our purpose in writing is to help you stay informed about these disturbing trends and to enable you to take steps to protect your students and taxpayers.

Sincerely,
/s/ Phil Burress
Phil Burress President

Enclosures

P.S. We previously sent you a report entitled *The Legal Liability Associated with Homosexuality Education in Public Schools.* If you would like to review it in light of the concerns we raise today, you may access it from our website at www.ccv.org. Please be sure that each of the members of your board receives a copy of this letter and its enclosures.

EXHIBIT K

[LOGO] The Campaign to Protect Marriage
presents OhioMarriage.com

8/13/2013 4:02 PM WEBPAGE

THE FACTS ABOUT ISSUE 1

Q. Why is Issue 1 on our ballot?

A. The answer is very simple. Right now there are legal actions in 11 states to change or undermine the definition of marriage. In Massachusetts, those who wish to change the definition of marriage were successful in convincing four out of seven judges to create same-sex "marriage" for that state. Other officials have defiantly refused to apply the well-established definition of marriage in their states, a defiance which threatens to result in legal chaos. The actions of these officials are being defended in some courts even as you read this sentence.

Right here in Ohio, the main opponents of Issue 1, many of whom already live in unmarried sexual relationships, believe that Ohio needs to change our definition of marriage, either now, or in the future. But do you hear the opponents of Issue 1 stating their goal to the public? The silence is deafening.

This is because they know that the people of Ohio would reject the goal of undermining or redefining marriage in our state.

That's one reason why over 550,000 Ohioans signed petitions to allow a vote on a Marriage Protection Amendment. Since judges are bound by the state constitution in a way that they are not bound by statutes, passage of Issue 1 would first and foremost insulate our definition of marriage from judicial re-

interpretation, undermining or being overturned outright.

Q. Is the Marriage Protection Amendment a reasonable response to the problem of judicial activism and the ongoing efforts all across America to change our definition of marriage?

A. Issue 1 is a very reasonable response. The passage of Issue 1 would represent great progress in protecting the institution of marriage for the citizens of Ohio, both for ourselves and for our children. The passage of Issue 1 would place Ohio right in the mainstream company of 213 million Americans whose states have already moved to recommit themselves to the American definition of marriage through the passage of Defense of Marriage Act (DOMA) statutes, and the total of 17 states that are expected to have Marriage Protection Amendments in place after the November 2nd election.

Nothing could be more reasonable than Ohio joining 37 other states in their effort to re-affirm our definition of marriage, either thorough DOMA laws or through constitutional amendments. This bill ensures that activist judges from faraway places will not undermine the unique place we have given marriage for generations.

Q. What do homosexual activists and revisionists really want and where can marriage redefinition lead our society?

A. One revisionist recently chastised the OCPM saying, "It is shameful to put up barriers to love, no matter whom the love is between."

Surely, we thought, no one means ALL barriers. She just thinks the proper gender requirement is wrong. So we asked if she was suggesting we eliminate other "discriminatory" state laws that limit how old someone must be before they can get married or the ones that say you can't get married if you are already married to someone else or the ones that limit the kinship of the ones you can marry.

To our shock, she actually said YES! "I do think we should eliminate state laws that say you can't get married to more than one person, or the [ones] that limit the kinship of those being married, as long as all the parties are adults capable of giving their full consent...If both people are adults who love each other, and their lives will be more fulfilling because of the marriage, it's up to them. Incestous [sp] relationships are not a new thing, they're even chronicled in the Bible."

To her credit, age limits are still OK. "I don't support the elimination of age of consent laws, as a child is not yet experienced enough to understand the decision they are making, and it is very easy for an adult to influence and coerce a child into something they don't understand." [signed: Carin]

Q. Why are both parts of the amendment needed in order to protect marriage in Ohio?

A: Most of the opposition to Issue 1 is targeted at the second sentence of the amendment. The problem with their position is that they are attempting to separate the two sentences when they are actually one in the same. The first defines marriage and the second identifies marriage as having a unique place in our society and protects it from any counterfeits.

There are many who would like to change the definition of marriage today. Without the second sentence, the door is left open to anyone-be it by judicial, legislative or executive means-creating any marital-type relationship that has all the qualities of marriage and just calling it something else such as a "civil union" or "domestic partnership." If someone *wants* to undermine or redefine marriage, then the door must be left open to other names. Otherwise, both parts are needed.

For example, the State of Ohio reserves the right to issue drivers licenses. No political subdivision within the state is allowed to create their own with other rules, such as allowing 12 year olds to drive, and then call it something different like a vehicular operators permit. This amendment prohibits the same circumvention with marriage.

Q. Will Issue 1 keep Ohio companies from hiring the people of their choice and make Ohio less attractive to new families and employees?

A. There is nothing in Issue 1 that would keep a state institution in Ohio from offering an attractive employment package to prospective employees. Furthermore, Issue 1 does not apply to private employers. The Federal Employee Retirement Income Security Act (ERISA) of 1974 protects the right of private companies to provide employee benefits to whomever they wish. And NO Ohio laws or amendments can override it. It's deceitful to say so.

It is true that some government employees live in unmarried sexual relationships. But should the state allow or promote official creation of "imitation

marriage" employee categories or legal status just for those few? No. Prospective employees can be offered other inducements, such as higher pay or other benefits not related to their choice of an unmarried sexual partner(s) if their talents or abilities are critical to an employer.

Some state institutions, such as universities, may wish to grant "domestic partner benefits," that is to give the same kind of benefits that a husband or wife might receive to unmarried individuals in a live-in sexual relationship. But a large majority of Ohioans believe this is wrong and that state approval or tax dollars should not be used in this way.

Issue 1 would further protect the unique place of marriage, strictly limiting the benefits of marriage to those who are married and keep them from being given to unmarried heterosexual or homosexual individuals, if the intent was to copy the design of marriage, thereby circumventing marriage laws and accessing its benefits through a back door. Sound reasonable? Sure, but not to some.

In a recent editorial board meeting with the Dayton Daily News, one hostile questioner actually blurted out, "Do you realize that if Issue 1 passes, individuals who are not married will not be able to obtain marital benefits?" Incredibly astute, wouldn't you say? But that fact is what incensed the individual.

Sometimes when public officials and institutions move to offer marriage-like benefits to employees in unmarried sexual relationships, they will do it secretly or with little public notice. Ohio State University trustees were sadly representative of this

fact this summer when, in apparent violation of Ohio's "Sunshine Laws" they, with no public notice or debate, voted to offer "domestic partner" benefits to their employees. Ohio newspapers and even Attorney General Jim Petro harshly criticized the University for its lack of openness in taking such a controversial and divisive step. For details see http://qopusa.comiohio/news/osutrustees0801.shtml

Furthermore, the question must be asked whether Issue 1 opponents truly believe that the best way for Ohio to grow economically is to offer special state recognition and tax dollar subsidies to people who are just shacking up. If so, they should state it openly.

The fact is that most Ohioans realize that if we want to attract folks to come to Ohio to make their living and raise their families here, then Issue 1 makes perfect sense. By not changing our definition of marriage, we send a message of stability and commitment to the values that most Americans hold dear. That is perhaps one reason why economic powerhouses like Nevada have passed a Marriage Protection Amendment and why other states like Utah, Michigan, Georgia, Kentucky and six others are on the verge of protecting marriage in their states.

The Bottom Line

One Ohio executive recently wrote the Ohio Campaign to Protect Marriage, "The bottom line is this: Marriage is good for the citizens of Ohio and Ohio employers. In fact, as you can read in the White Paper, **Why Supporting Marriage Makes Business Sense,** "Since married employees are

generally happier, healthier, and more dependable than single or cohabiting employees, employers should adopt policies that promote stable marriages for their employees.' Here is a copy for you."

The OCPM would like to share this with those who are interested in promoting and protecting marriage. See: http://www.corporateresourcecouncil.orq/white papers.html

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Q. Will Issue 1 take away any benefits currently afforded to state or government employees?

A. Any legal contracts in force at the time of passage remain legal until the contract expires, as with any other legal contract in the state regardless of the parties. Legally binding contracts cannot be nullified by the passage of any law. So since most of the state universities contract their employment through union negotiations, those union contracts remain valid until expiration, thereby allowing any domestic partner benefits to continue. If passed, the amendment will prohibit the state or political subdivisions from subsequently attempting to change or recognize a change in the definition of marriage. Because state universities are considered state institutions, they would not be allowed to create their own definition of marriage or attempt to approximate it *after* the passage of the amendment.

Q. Does Issue 1 prohibit individuals from bequeathing their property through a will to whomever they wish?

A. Absolutely not. The second part has absolutely nothing to say about the right of anyone to bequeath whatever he/she wants to another individual. All

these matters are the subjects of legal instruments, which have their operation completely independent of the nature of the relationship of the affected parties. A judge asked to enforce any of these contracts or legal instruments need not give the first moment's consideration to what kind of personal relationship the parties have. The question won't be asked if they are married or not, if there is a will involved. If there is no will, then the state legislature has already dictated in state law how the estate will be distributed.

Paid for by Ohio Campaign to Protect Marriage PAC
Phil Burress, Chairman
11175 Reading Road, Suite 103
Cincinnati, OH 45241

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EXHIBIT L

[LOGO] CRC
Corporate Resource Council

Do Domestic Partner Benefits Make Good Business Sense?

This paper serves as an introduction to the White Papers currently available from CRC. Contrary to arguments put forth by advocacy groups, domestic partner benefits do not make good business sense for most employers. It makes better economic sense for employers to promote healthy marriages among employees because married employees generally provide a more dependable and more motivated workforce.

Why Supporting Marriage Makes Business Sense

Since married employees are generally happier, healthier, and more dependable than single or cohabiting employees, employers should adopt policies that promote stable marriages for their employees. Studies have shown that divorce reduces the productivity, health and general welfare of employees. In addition, it has been well documented that cohabitation does not provide the same benefits as marriage to employers, individuals or children- and that women and children suffer the most severe consequences of divorce and cohabitation.

Answers to an Employer's Legal Questions about Domestic Partner Benefits and Sexual Orientation Nondiscrimination Policies

Many employers have no idea that adding sexual orientation to their nondiscrimination policies may

expose them to significant legal problems. Potential problems include:

- Possible legal liability in states that do not prohibit sexual orientation discrimination (laws in 12 states and the District of Columbia prohibit discrimination based upon sexual orientation);
- A conflict between the implementation of the sexual orientation policy and the employer's duty under Title VII to protect employees from a sexually hostile work environment;
- Lawsuits over which restrooms transgendered persons should use (if transgender is included); and
- A conflict between the choice to protect sexual orientation and the duty under Title VII to accommodate religious beliefs.

No law of general application requires employers to provide domestic partner benefits to employees.

Behind the Rhetoric: The Social Goals of GLBT Advocacy in Corporate America

Although people who identify themselves and seek benefits as gay, lesbian, bisexual and transgender ("GLBT") constitute approximately 2 percent of the population, they have brought about tremendous social transformation in recent years. The social goals of many GLBT advocates include the elimination of sexual mores, the reformation of the traditional concepts of marriage and family, and the establishment of GLBT relationships as equal to heterosexual relationships. GLBT advocates openly acknowledge that Corporate America is a key vehicle

for achieving social change, and they have a well-organized strategy for reaching their goals.

The Hidden Costs of Domestic Partner Benefits

A lack of public data about domestic partner benefits makes it difficult to predict what it will cost any particular company to provide such benefits. Advocates of domestic partner benefits assert that the cost of health care is about the same for same- or opposite-sex cohabiting couples as it is for married couples. But one insurance company found that it paid 17.1% more for health care for same-sex couples in 2001 than it did for opposite-sex couples. This paper explores the reasons why employers should expect to pay more for domestic partner health care than for married couple health care.

The Health Risks of Gay Sex

Sexual relationships between members of the same sex expose gays, lesbians and bisexuals to extreme risks of sexually transmitted diseases, physical injuries, mental disorders and even a shortened life span. This paper documents those risks, and draws a provocative conclusion: A compassionate response to requests for social approval and recognition of GLB relationships is not to assure gays and lesbians that homosexual relationships are just like heterosexual ones, but to point out the health risks of gay sex and promiscuity.

A Model Approach to Employee Benefits Decisions

Employers can simplify the decision-making process about employee benefits by having a predetermined structure for making sound business decisions. This is especially helpful when it comes to controversial issues like domestic partner benefits.

EXHIBIT M

8/13/2013 10:20 AM WEBPAGE

Tuesday October 26, 2044

Media blitz begins for Ohio's Issue 1

By Jim Siegel
Enquirer Columbus Bureau

COLUMBUS—Opponents of state Issue 1 are hitting the airwaves with ads that barely mention the word "gay," instead framing the same-sex marriage proposal as harmful to Ohio seniors and the economy.

"It's not a gay issue," said Alan Melamed, chairman of the coalition that opposes the constitutional amendment that would ban gay marriage and public domestic partner benefits for unmarried couples.

"Whether this amendment fails or succeeds, the definition of marriage in Ohio is the same," he added, noting state law defines marriage as between a man and woman. It's the (proponents) trying to make it about gay marriage because they know it's a hot-button issue."

Opponents began spending more than $1.5 million to air three anti-Issue 1 ads. The ads repeatedly call the amendment "extreme," with consequences for all unmarried couples.

Each ad ends with the phrase, "It could hurt you."

But while opponents are talking about property rights and jobs, Phil Burress, leader of the Cincinnati-based group trying to pass the amendment, said he's ready to respond with upwards of $1 million in television ads.

He called the opposition ads "scare tactics," and said his effort is entirely about gay marriage, responding to court rulings in Massachusetts that made gay marriage legal.

"Our whole campaign is about marriage between one man and one woman," he said. "If it's anything other than that, I don't know what it can be."

The amendment is necessary to prevent judges from one day forcing Ohio to accept gay marriages or to keep them from renaming marriage as civil unions, Burress said.

His group has already placed phone calls to 3.3 million households, in which a recording of Secretary of State Ken Blackwell urges a vote for the amendment. Supporters also have sent 2.5 million featuring Blackwell.

Herb Asher, a political science professor at Ohio State University, said he got one of those calls from Blackwell. He found it unusual that the state's top elections official was trying to tell him how to vote. In addition, he said Blackwell's message that Issue 1 is simply about gay marriage isn't true.

"It really is more of a fundamentalist amendment that is imposing a very narrow view of social relationships," Asher said.

The amendment's first sentence defines marriage between a man and a woman. But the second sentence has drawn controversy because it forbids legal status for unmarried individuals "that intends to approximate the design, qualities, significance or effect of marriage."

Critics, including Republicans Gov. Bob Taft, Attorney General Jim Petro and U.S. Sens. Mike DeWine and George Voinovich, say that second sentence is too broad and could have unwanted consequences on unmarried couples and the state economy.

The University of Cincinnati Ohio Poll published Oct. 22 showed Issue 1 passing 56 percent to 40 percent.

Issue 1 opponents on Monday filed a complaint with the Ohio Elections Commission, alleging that the pro-Issue 1 group did not fully report its contributions and expenditures last week. Burress says the law was followed.

Email: jsiegel@enquirer.com

GANNETT
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EXHIBIT N

RADIO & TELEVISION ADVERTISEMENT TRANSCRIPTS SUPPORTING ISSUE 1

Transcript of "Common Sense" Television Ad:

It's just common sense. Ohio families are stronger with a wife AND a husband. Our children do better with a mother AND a father. We won't have a future unless moms and dads have children. That's why governments have recognized and uniquely protected marriage for more than 2,000 years. Why change that? Voting "Yes" on Issue 1 KEEPS marriage between one man and one woman. That's just common sense. Say "Yes" to marriage. Vote "Yes" on Issue L It's just common sense.

Transcript of "What You Know" Radio Ad:

Ken Blackwell is a director of the National Taxpayers Union and has led efforts to repeal Ohio's sales tax increase. This is Ohio Secretary of State Ken Blackwell. My mom and dad always taught me to "stick with what you know." Voting "Yes" on Issue 1, the Ohio Marriage Amendment, does just that. Some people say Issue 1 will somehow hurt our state's economy. But these same people set by quietly over the past ten years as Ohio government spending increased by more than 70%. And I didn't hear a peep from them last summer while state government passed the largest tax increase in our state's history. And now they want us to believe that marriage, the way we've always known it, will somehow hurt our economy. Here's what I know. Bad politics hurts our economy, not marriage. Let's stick with what we know to be right. I'm Ken

Blackwell. For the future of Ohio, vote "Yes" on Issue 1, Ohio's Marriage Amendment.

Transcript of "Both Ways" Radio Ad:

This is Ohio Secretary of State Ken Blackwell. My mom and dad always taught me that you can't have it both ways. Voting "Yes" on Issue 1, the Ohio Marriage Amendment, simply affirms that. Some folks have yet to learn that, especially politicians who say they're opposed to same-sex marriage, but will not support Issue 1. Why? Because they want to have it both ways. Every major social science study tells us time and again: families are stronger with a wife and a husband; children do better with a mother and a father. That's why marriage is the building block of society, and why government's grant benefits based on that. We just can't have it both ways. Marriage is between one man and one woman. And we should only give the benefits of marriage to those who are actually married. So vote "Yes" on Issue 1, the Ohio Marriage Amendment. Let's go with what we know is right. I'm Ken Blackwell. For the future of Ohio, vote "Yes" on Issue 1.

Transcript of "CommonSense" Radio Ad:

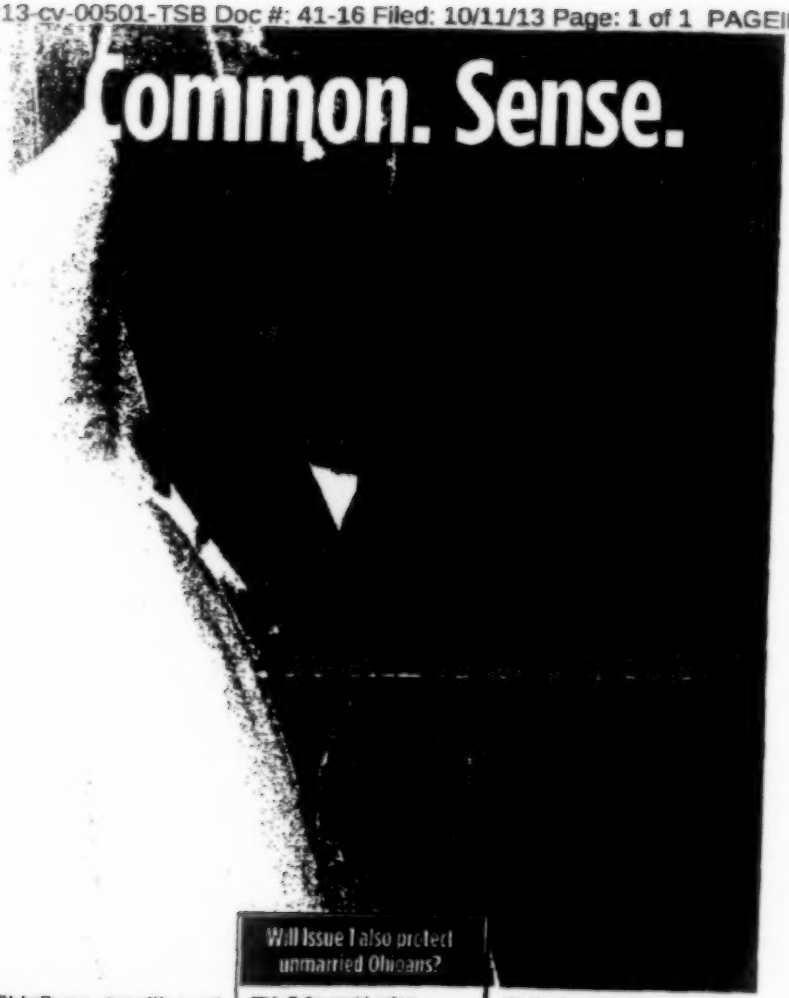
This is Ohio Secretary of State Ken Blackwell. My mother and father taught me many things. But one of the most important was to use common sense. Voting "Yes" on Issue 1, the Ohio Marriage Amendment, is just common sense. Ohio families are stronger with a wife and a husband. Our children do better with a mother and a father. That's just common sense. It's clear that we don't have a future unless moms and dads have children. That's why

marriage is between a man and a woman. Just as God created it. And why governments have recognized it for thousands of years. So protecting marriage is really just common sense. So on November the second vote "Yes" on Issue 1, and protect marriage between one man and one woman. Some call Issue 1 the "Marriage Protection Act." I like to call it the "Common Sense Protection Act." Either way it's a great idea. I'm Ken Blackwell. For the future of Ohio, vote "Yes" on Issue 1.

Transcript of "Respect" Radio Ad:

This is Ohio Secretary of State Ken Blackwell. My mom and dad taught me a great deal about respect. How each individual is one of God's unique creations. How they deserve respect, even when you may disagree with them. Voting "Yes" on Issue 1, the Ohio Marriage Amendment, does just that. Voting "Yes" on Issue 1 keeps marriage as God created it, between one man and one woman. Some homosexual activists say that doesn't respect them. I disagree. The Bible teaches me to love my neighbor, regardless of their lifestyle. But it also teaches me to never compromise the truth. If you respect others you'll always tell them the truth. Ken Blackwell has twice been awarded the State Department Superior Honor Award for his human rights work. Please join him in voting "Yes" on Issue 1. Voting "Yes" on Issue 1 shows respect for marriage. This is Ken Blackwell. For the future of Ohio, vote "Yes" on Issue 1.

Radio and television transcripts were found at: *Legal Issues & News,* OHIO CAMPAIGN TO PROTECT MARRIAGE, http://www.ohiomarriage.com/LegalIssues_&_News.shtml (last visited Mar. 13, 2010).



Marriage: One Man One Woman

YES on Issue 1

COMMON SENSE. PUBLIC GOOD.

www.ohiomarriage.com

EXHIBIT
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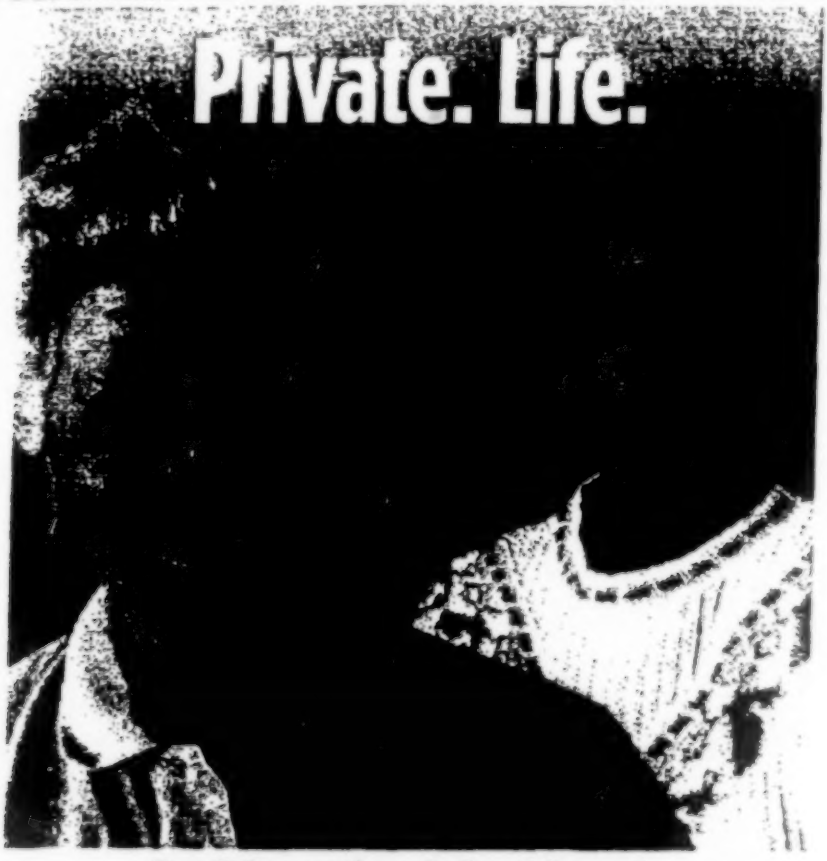

Don't be confused about Issue 1. Protecting marriage won't hurt unmarried citizens.

It's common sense to ask some simple questions before you vote.

Issue 1 – the Ohio Marriage Amendment – is not designed to deny anyone private legal rights. It's only designed to protect marriage between a man and a woman. Don't be misled. Before you vote, ask what Issue 1 will do.

Q: Will it **still allow** unmarried couples to make contracts, like owning a home or a business together or other joint property?

A: YES *Joint ownership isn't subject to unmarried marital status.*

Q: Will it **still allow** unmarried Citizens to make out wills together?

A: YES *The nature of such relationship is not relevant to property distribution.*

Q: Will it **still allow** powers of attorney between unmarried Ohio citizens?

A: YES *Marital status is irrelevant to a power of attorney relationship.*

Q: Will it **still permit** the benefits individuals and unmarried couples receive from their employers?

A: YES *It allows for no interference with contracts between private parties.*

There are facts from Ohio law. Don't be misled. No state law requires married status to be considered when ordering private contracts, wills, or benefits.

Marriage protects a common good. But's just common sense.

Marriage has always been uniquely protected in Ohio law. No other social structure provides a better foundation for a stable community and for civilized transmission from marriage between one man and one woman.

Why change that? Why deliberately weaken Ohio's social fabric – as well as our economy – by watering down the institution of marriage?

Ohio families are stronger with a wife AND a husband.

Our children do better with a mother AND a father.

We can't ignore every major social science study that shows children raised with a married mom and dad are simply better off physically, socially, and psychologically than in any other family structure. That's why protecting marriage is just common sense. Don't be confused by wild claims. Governor Bob Taft, Jim Petro and others are relying on fear to defeat marriage between one man and one woman. So ask the critical questions...and rely on your common sense.

When you vote on Tuesday, cast your vote for common sense. Vote for the common good. Vote to keep marriage between one man and one woman.

Marriage: One Man One Woman

YES on Issue 1

COMMON SENSE. PUBLIC GOOD.

www.ohiomarriage.com

EXHIBIT
Becker
P

EXHIBIT Q

OHIO ISSUES REPORT
State Issue Ballot Information for the November 2, 2004 General Election

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Distributed By
The Ohio Ballot Board
Secretary of State J. Kenneth Blackwell,
Chairman

This publication gives Ohioans an opportunity to compare the arguments for and against the statewide issue on the November 2nd ballot. The ballot language for Issue 1 was certified by the nonpartisan Ohio Ballot Board. The explanations/arguments for and against Issue 1 were written by the individuals listed and are printed as submitted to my office.

We urge all Ohioans to study the issue carefully and then vote on November 2.

/s/ J. Kenneth Blackwell
J. Kenneth Blackwell

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PROPOSED CONSTITUTIONAL AMENDMENT
(Proposed by Initiative Petition)

ISSUE 1

Be it Resolved by the People of the State of Ohio:

That the Constitution of the State of Ohio be amended by adopting a section to be designated as Section 11 of Article XV thereof, to read as follows:

Article XV

Section 11. Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

A majority yes vote is necessary for passage.

	YES	SHALL THE PROPOSED AMENDMENT BE ADOPTED?
	NO	

EXPLANATION AND ARGUMENT IN SUPPORT OF MARRIAGE PROTECTION AMENDMENT (ISSUE 1)

Vote YES on Issue 1 to preserve in Ohio law the universal, historic institution of marriage as the union of one man and one woman, and to protect marriage against those who would alter and undermine it.

WHAT ISSUE 1 DOES:

- Issue 1 establishes in the Ohio Constitution the historic definition of marriage as exclusively between one man and one woman as husband and wife.

- Issue 1 excludes from the definition of marriage homosexual relationships and relationships of three or more persons.

- Issue 1 prohibits judges in Ohio from anti-democratic efforts to redefine marriage, such as was done by a bare majority of the judges of the Massachusetts Supreme Court, which ordered that same-sex "marriage" be recognized in that state.

- Issue 1 restricts governmental bodies in Ohio from using your tax dollars to give official status, recognition and benefits to homosexual and other deviant relationships that seek to imitate marriage.

WHAT ISSUE 1 DOES NOT DO:

- Issue 1 does not interfere in any way with the individual choices of citizens as to the private relationships they desire to enter and maintain.

- Issue 1 does not interfere in any way with government benefits granted to persons in non-marital homosexual relationships, so long as the government does not grant those benefits to such persons

specifically for the reason that the relationship is one that seeks to imitate marriage.

The wisdom of the ages tells us that marriage between one man and one woman is critical to the wellbeing of our children and to the maintenance of the fundamental social institution of the family. Please vote to preserve marriage on November 2, 2004.

Please Vote YES on Issue 1,
the Marriage Protection Amendment.

Submitted by the Ohio Campaign to Protect Marriage:

Rev. K.Z. Smith
Lori Viars
Phil Burress

The Ohio Marriage Amendment. It's Not What You Think.

It Hurts Families.

If passed, Issue I will eliminate rights, benefits and protections for all unmarried couples in Ohio. Claims that it merely restates Ohio's long-standing definition of marriage are untrue, Even Defense of Marriage Act author State Representative Bill Seitz said the amendment is poorly written and too ambiguous. Governor Taft and Attorney General Petro say it goes too far.

While claiming to protect Ohio families, Issue 1 actually punishes:

- Senior living together to protect pension benefits
- Unmarried couples seeking to jointly own property
- People who receive health benefits from domestic partner plans

- Unmarried women seeking maternity leave
- Adopted children of unmarried couples

If this amendment passes, even an unmarried person's right to leave property to a partner could not be recognized by Ohio courts.

Referring to leaders behind the amendment, The Canton Repository said ...

"They make no bones about wanting to make life as difficult as possible for all couples, gay or straight, who don't toe their moral line."

It Hurts Ohio's Economy.

Leading economic and legal experts agree that Issue I would have a negative impact on our struggling economy. The editorial page editor of the Cleveland Plain Dealer stated in a recent editorial that this amendment would cost the state thousands of jobs, and help perpetuate Ohio's "long and relentless dive to the bottom."

Crain's Cleveland Business summed up the economic impact by stating, "The ability to offer such benefits [domestic partner benefits] is a critical tool to many companies and universities in Ohio. The article concluded the editorial by saying ...

"Regardless of your feelings about gay marriage, this amendment deserves to be defeated because it is anti-business and anti-competitive."

VOTE NO ON ISSUE 1. PROTECT OHIO FAMILIES AND JOBS.

Submitted By: Ohioans Protecting the Constitution

Alan Melamed, Chair Mary Jo Hudson, Treasurer

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Mr. Thomas R. Winters

DATES TO REMEMBER

September 28
Absentee balloting begins.

October 30 at noon
Deadline for applying for an absentee ballot by mail for the November 2nd election.

November 1
Deadline for voting an absentee ballot in person at a county board of elections for the November 2nd election.

November 2
Election Day
Polls open 6:30 a.m. to 7:30 p.m.

For more information contact:

Secretary of State J. Kenneth Blackwell
180 E. Broad Street, 15th Floor
Columbus, Ohio 43215
Telephone: (614) 466-2585
http://www.ohiospirit.org

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 10/11/13]

Civil Action No. 1:13-cv-501

JAMES OBERGEFELL, ET AL.

Plaintiffs,

v.

THEODORE E. WYMYSLO, ET. AL.,

Defendants.

Judge Timothy S. Black

EXPERT DECLARATION OF GEORGE CHAUNCEY IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLRATORY JUDGMENT AND PERMENANT INJUNCTION

I, George Chauncey, hereby declare and state as follows:

Expert Background and Qualifications

1. I am the Samuel Knight Professor of History and American Studies and past Chair of the Department of History at Yale University, where I have taught since 2006. My testimony will relate to my opinions as an expert in the history of the United States in the twentieth century and gender, homosexuality, sexuality, and civil rights in the United States, with a particular focus on the history of

discrimination experienced by gay men and lesbians in the United States. I have actual knowledge of the matters stated in this declaration, and could and would so testify if called as a witness.

2. My background, experience, and publications are summarized in my curriculum vitae, which is attached as Exhibit A to this declaration. In the past four years, I have testified as an expert—either at trial or through declaration—or been deposed as an expert in *Darby et al. v. Orr*, Nos. 12-CH-19718 and 12-CH-19719 (Cir. Ct. Cook County, Ill.); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), *Gill v. Office of Pers. Mgmt.*, No. 09–10309 (D. Mass.), *Commonwealth of Mass. v. U.S. Dep't of Health and Human Servs.*, No. 09 11156 (D. Mass.), *Windsor v. U.S.*, 833 F.Supp.2d 394 (S.D.N.Y. 2011), *Pedersen v. Office of Personnel Management*, 2012 WL 3113883 (D. Conn.), *Golinski v. Office of Personnel Management*, 824 F.Supp.2d 968 (N.D. Cal. 2012), *Dragovich v. U.S. Dep't of the Treasury*, 2012 WL 1909603 (N.D. Cal. 2012), *Donaldson v. Montana*, No. 10-702 (Mont. 1st Jud. Dist. Ct.), *Jackson v. Abercrombie*, 2012 WL 3255201 (D. Haw. 2012); *Cooper-Harris v. United States*, No. CV 12 0887 (C.D. Cal.); and *Sevcik v. Sandoval*, No. 2:12-CV-00578-RCJ-PAL (D. Nev)—all of which involved testimony on topics similar to those discussed below. Although it is more than four years ago, I also testified in *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 838 F. Supp. 1235 (S.D. Ohio 1993) *rev'd and vacated*, 54 F.3d 261 (6th Cir. 1995) *cert. granted, judgment vacated*, 518 U.S. 1001 (1996).

3. From 1991 to 2006, I was a Professor of History at the University of Chicago. I am the author of *Gay New York: Gender, Urban Culture, and the Making of*

the Gay Male World, 1890-1940 (New York: Basic Books, 1994), which won the Organization of American Historians' Merle Curti Award for the best book in social history and Frederick Jackson Turner Award for the best first book in any field of history, the Los Angeles Times Book Prize in History, and Lambda Literary Award. I am also the author of *Why Marriage? The History Shaping Today's Debate over Gay Equality* (New York: Basic Books, 2004); coeditor of three books and special journal issues, including *Hidden From History: Reclaiming the Gay and Lesbian Past* (NAL, 1989); and the author of numerous articles, which are listed in my curriculum vitae, attached to this declaration as Exhibit A.

4. In preparing this Declaration, I reviewed the Complaint in this case. I base my opinions on my own research, experience and publications, the work of other historians and scholars as listed in the attached bibliography (Exhibit B), and the general statutes of a number of states, including Illinois, New York, Connecticut, Vermont, and New Hampshire.

5. I have been retained by counsel for Plaintiffs in this litigation. I am being compensated at a rate of $400 per hour for preparation of reports or declarations; $450 per hour for time spent preparing for and giving deposition or trial testimony; and $4,500 per day spent preparing for or attending trial. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

Summary of Opinions

6. It is my professional opinion that the historical record, which is outlined below, demonstrates that gay and lesbian people have been subject to widespread

and significant discrimination and hostility in the United States.

7. Through much of the twentieth century, in particular, gay men and lesbians suffered under the weight of medical theories that treated their desires as a disorder; penal laws that condemned their consensual adult sexual behavior as a crime; police practices that suppressed their ability to associate and socialize publicly; censorship codes that prohibited their depiction on the stage, in the movies, and on television; and federal policies and state regulations that discriminated against them on the basis of their homosexual status. These state policies and ideological messages worked together to create and reinforce the belief that gay and lesbian persons comprised an inferior class to be shunned by other Americans.

8. Despite social and legal progress in the past thirty years towards greater acceptance of homosexuality, gay and lesbian people continue to live with the legacy of the anti-gay measures enacted in the 1930s, 1940s, and 1950s and the attitudes that motivated those measures. That legacy is evident both in laws that remain on the books and in the many legal protections that have not been enacted.

9. Among the many products of the legacy of discrimination in the twentieth century, the most conspicuous today include Congress' repeated failure to enact or even seriously consider federal legislative protections for gay and lesbian people in housing, employment, and public accommodations; the numerous state statutes and constitutional amendments that brand gay men and lesbians as second-class citizens by denying them the right to marry the person they love; and the former federal Defense of Marriage Act, which until a few months ago prohibited the

federal government from recognizing such a marriage when it did occur. The legacy of discrimination is also evident in the demeaning stereotypes and inflammatory rhetoric used by anti-gay organizations and public officials as they campaign to enact further measures meant to erode gay people's civil rights and diminish their status as full citizens of the United States—campaigns that are, to this day, very often successful.

10. Today, the limited civil rights enjoyed by gay and lesbian Americans vary substantially from region to region and are still subject to the vicissitudes of public opinion. Like other minority groups, gay men and lesbians often must rely on judicial decisions to secure equal rights.

History of Discrimination Against Gay and Lesbian People in the United States

I. Introduction

11. While there is ample evidence that same-sex attraction, love, and intimacy have persisted across the ages, most historians now agree that the concept of the homosexual and the heterosexual as distinct categories of people emerged only in the late nineteenth century. This concept had profound effects on the regulation of homosexuality. Early American legislators, drawing on their understanding of ancient Judeo-Christian prohibitions against sodomy and "unnatural acts," penalized a wide range of non-procreative behavior, including many forms of what would now be called homosexual conduct. While these laws prohibited conduct, it was in the twentieth century that governments began to classify and discriminate against certain of their own citizens on the basis of their status or identity as homosexuals.

12. Official, government-sanctioned hostility and discrimination has had a profound and enduring negative impact on lesbians and gay men in American society. In the 1920s, the State of New York prohibited theaters from staging plays with lesbian or gay characters. Beginning in the 1930s and 1940s, many states prohibited gay people from being served in bars and restaurants. In the 1950s, the federal government banned the employment of homosexuals and insisted that its private contractors ferret out and dismiss their gay employees. It also prohibited gay foreigners from entering the country or securing citizenship. Until the 1960s, all states penalized sexual intimacy between men. Throughout the twentieth century, many municipalities launched police campaigns to suppress gay meeting places, and sought to purge gay civil servants from government employment.

13. Private hostility and discrimination, often encouraged by government officials, has had a similarly profound and enduring negative effect on lesbians and gay men in American society. Until the 1970s, leading physicians and medical researchers claimed that homosexuality was a pathological condition or disease. In the 1930s, the Hollywood studios enacted a censorship code that for nearly thirty years prohibited the discussion of gay issues or the appearance of gay or lesbian characters in the era's most powerful communications medium. In the 1940s and 1950s, municipal police officials, state governmental leaders, local newspapers, and national magazines justified anti-gay discrimination and the suppression of gay meeting places by fostering frightening stereotypes of homosexuals as child molesters. These stereotypes have had enduring consequences, and continue to inspire public fears and hostility, especially concerning gay teachers and parents. In the

1980s, the early press coverage of AIDS reinforced the view that homosexuals were diseased and threatened other Americans. In the 1990s, many clergy condemned (and still condemn) homosexuality as sinful. The Southern Baptist Convention, for example, called for a boycott of all Disney products because Disney offered domestic partnership benefits to its employees and Disneyland organized gay theme nights. Also, some anti-gay groups threatened to organize boycotts against the sponsors of network television shows which included gay characters.

14. Historically, anti-gay measures often were enacted or strengthened in response to periods of relative growth in the visibility or tolerance of gay people. For example, the effervescence and visibility of gay life in the 1920s contributed to the backlash gay and lesbian people endured during the Great Depression. The increased visibility of gay men and lesbians during the Second World War helped precipitate a second wave of hostility in the late 1940s and 1950s. The dramatically increased visibility of gay people in the 1970s and 1980s, and their success in persuading some state and local governments to include sexual orientation in their anti-discrimination laws, resulted in a wave of referenda and initiatives between 1977 and the early 1990s that overturned such laws and/or prohibited the enactment of others.

15. In recent decades, and especially in the last twenty years, many (though not all) of these discriminatory measures were repealed, but considerable discrimination and animosity persisted. Given the long history of campaigns demonizing homosexuals as child molesters, it is unsurprising that in 1977—the year Anita Bryant launched her "Save Our Children" campaign—two-thirds of Americans

told pollsters they objected to lesbians or gay men being hired as elementary school teachers. By 1992, after fifteen years of extensive public discussion of this and other gay issues, opinion had shifted, but half of those parents polled still rejected the idea of their child having a gay elementary school teacher. By 2002, about forty percent of Americans still were unwilling to have elementary schools employ gay teachers, and one-third of them found gay high school teachers unacceptable.

16. When marriage emerged as the new flashpoint in debates over civil rights for gay men and lesbians almost two decades ago, the debate was shaped by the legacy of anti-gay policies and attitudes. Many Americans initially responded to the idea that gay and lesbian couples should be allowed to marry with the same misgivings and even hostility with which they once greeted the idea of gay teachers or gay characters on television sitcoms. Opponents of marriage equality mobilized some of the most enduring anti-gay stereotypes to heighten public apprehension. For instance, during the 2008 campaign over Proposition 8—the California ballot initiative that revoked the marriage rights of gay men and lesbians that the California Supreme Court had recognized under the state constitution—several television commercials aired by the supporters of Proposition 8 warned that marriage equality might encourage children to become homosexuals themselves. The recent campaign to repeal marriage equality in Maine used the same tactics, including recycling commercials and scripts from the Proposition 8 campaign because they had been so effective in California. Likewise, material from the Nevada campaign to amend the state constitution to bar marriage for same-sex couples stated "Let's not experiment with Nevada's children." The approval of

Proposition 8 in California, Question 1 in Maine, Question 2 in Nevada, and similar laws and constitutional amendments in a total of forty-one states, including Ohio's constitutional amendment, which was passed by the voters in 2004, indicates the enduring influence of anti-gay hostility and the persistence of ideas about the inequality of gay people and their relationships. The civil rights enjoyed by gay and lesbian people throughout the United States continue to be subject to the vicissitudes of public opinion in an ever-changing social, political, and cultural landscape.

17. At several critical junctures, a handful of state and federal courts have been the only authorities willing to defend the rights of gay people against the antipathy of the majority. In the 1950s and 1960s, at a time when overwhelming public sentiment supported the criminalization of gay bars and other meeting places, state courts in California and New York ruled that gay people had the right to assemble. In 1954, the United States Supreme Court ruled that the United States Post Office could not ban a gay political magazine from the mails. In the 1990s, when voters in cities and states across the country were voting to ban states and local municipalities from enacting anti-discrimination protections for gay people, the Supreme Court, in *Romer v. Evans*, struck down a Colorado constitutional amendment that withdrew from gay men, lesbians, and bisexuals, but no others, specific legal protection from discrimination. Sometimes quickly and sometimes more slowly, these decisions played a critical role in shifts in public opinion.

II. The Roots of Anti-Gay Discrimination

18. The first American laws against homosexual conduct were rooted in the earliest English settlers' understanding of the religious and secular traditions that prohibited sodomy, and they reflected the ambiguity of those traditions. Although sodomy included some forms of what today would be called homosexual conduct, medieval theologians did not use sodomy to refer systematically and exclusively to such conduct; for example, they rarely understood sodomy to include oral sex or sex between women.

19. The English Reformation Parliament of 1533 turned the religious injunction against sodomy into the secular crime of buggery when it made "the detestable and abominable vice of buggery committed with mankind or beast" punishable by death. The English courts interpreted this to apply to sexual intercourse between a human and an animal and anal intercourse between a man and woman or between two men.

20. Colonial American statutes drew on these religious and secular traditions and shared their imprecision in the definition of the offense. Variously defining the crime as (the religious) sodomy or (the secular) buggery, they generally proscribed anal sex between men and men, men and women, and humans and animals, but their details and their rationales varied. The southern colonies generally adopted the English law against buggery, while the Puritan New England colonies usually drew on religious traditions to penalize many forms of "carnall knowledge," including adultery, fornication, sex with prepubescent girls, and "men lying with men."Puritan clergy in the New England colonies were especially vigorous in their denunciation of sodomitical sins as contrary to

God's will, but their condemnation was motivated by the pressing need to increase the population and to secure the stability of the family, as well as their reading of scripture. In the Massachusetts Bay Colony, sodomy was prohibited in 1641 by a statute taken directly from Leviticus: "If any man lyeth with mankinde as he lyeth with a woeman, both of them have committed abhomination, they both shall surely be put to death." Although several men were executed for sodomy, the colonies rarely prosecuted men for this offense, for reasons that still are not entirely clear to historians.

III. Modern American History: 1890-1940

21. Prosecutions for sodomy and related offenses increased dramatically in the late nineteenth and early twentieth centuries as a result of the emergence of the idea of the homosexual as a distinct category of person, the expansion of laws penalizing homosexual conduct, and the growing influence of religiously-inspired moral reform societies that insisted on criminal prosecutions. In 1914, for example, the Supreme Court of Nevada held that the state's statute criminalizing "infamous crimes against nature" encompassed oral as well as anal intercourse, each being an "'abominable crime not fit to be named among Christians.'" *In re Benites*, 37 Nev. 145, 149 (1914).

22. These types of prosecutions continued to penalize people on the basis of their homosexual conduct rather than their identity as homosexuals. Current historical research suggests that the concept of the homosexual as a distinct category of person developed as recently as the late nineteenth century. The word "homosexual" appeared for the first time in a German pamphlet in 1868, and was introduced to the American lexicon only in 1892. Between the 1920s

and 1950s, the government, drawing on long traditions of hostility to same-sex conduct and responding both to new conceptions of the homosexual as an individual and to the growing visibility of those individuals, began to classify and discriminate against certain of its citizens on the basis of their status or identity as homosexuals. This discrimination reached remarkable, and still largely unrecognized, proportions.

23. The dramatic growth of American cities in the late nineteenth century permitted lesbians and gay men to develop a more complex and extensive collective life than was possible in small towns and rural areas. While everyone was likely to know everyone else's business in small towns, the size, complexity, and relative anonymity of cities made it easier for gay people (and other nonconformists) to forge a collective life with people like themselves, away from the eyes of hostile outsiders. The early history of the migration of gay people to the relative freedom of the cities is little understood, but it seems to have increased in the early twentieth century, at about the same time as growing numbers of African Americans fled the small towns of the Jim Crow South for the relative freedom of northern cities. Like African Americans, gay people, both black and white, found that the relative freedom of city life was tempered by continuing hostility and discrimination.

24. The emergence of gay and lesbian communities described in this Declaration took place in varying degrees in every American city studied by historians. Because the field of lesbian and gay history remains relatively young in 2013 and has been hampered by the legacy of censorship described below, historians still know most about the history of such communities

in major metropolitan centers such as New York, San Francisco, Los Angeles, and Chicago, and they will therefore loom large in the history that follows. However, recent studies of the gay history of smaller cities and communities, ranging from Buffalo, New York, and Portland, Oregon, to Jackson, Mississippi, and its surrounding rural areas, both confirm the broad outlines of the history described here and reveal regional variations in that history. Important recent historical studies of the development of federal and military policies concerning homosexuality and gay citizens have documented discriminatory laws and policies that had nationwide effects.

25. New York City provides one of the best documented examples of the emergence of a distinctive gay world in the early twentieth century. By the 1910s, New York's "gay world" included gay residential and commercial enclaves in several immigrant, African American, and bohemian neighborhoods; widely publicized dances and other social events; and a host of commercial establishments where gay people gathered, ranging from saloons, speakeasies, and bars to cheap cafeterias and elegant restaurants. In the 1920s and early 1930s, gay writers and performers produced a flurry of gay literature and theater. Some gay people were involved in long-term relationships they called marriages. Most remained very careful to conceal their homosexuality from non-gay associates, though, for fear of losing their jobs, homes, and respect.

26. Many Americans responded to the growing visibility of gay life with fascination and sympathy, regarding it as simply one more sign of the growing complexity and freedom from tradition of a burgeoning metropolitan culture. Popular fascination with gay

culture reached a crescendo during the Prohibition Era (or Jazz Age), when lesbians ran some of the most popular tearooms and cafes in bohemian neighborhoods such as New York's Greenwich Village and Chicago's Towertown. That said, the poor, immigrant, African American, and bohemian neighborhoods where gay life became most visible were regarded as the underside of city life by "respectable society."

A. Hostile Religious and Medical Views Prompted the Escalation of Anti-Gay Policing in the Early Twentieth Century

27. Other Americans regarded the growing visibility of lesbian and gay life with dread. Hostility to homosexuals sometimes was motivated by an underlying uneasiness about the dramatic changes underway in gender roles at the turn of the last century. In this era—indeed until 1973—homosexuality was classified as a disease, defect, or disorder. Conservative physicians initially argued that the homosexual (or "sexual invert") was characterized as much by his or her violation of conventional gender roles as by specifically sexual interests. At a time when many doctors argued that women should be barred from most jobs because employment would interfere with their ability to bear children, numerous doctors identified suffragists, women entering the professions, and other women challenging the limits placed on their sex as victims of a medical disorder. Thus, doctors explained that "the female possessed of masculine ideas of independence" was a "degenerate" and that "a decided taste and tolerance for cigars, * * * [the] dislike and incapacity for needlework * * * and some capacity for athletics" were all signs of female "sexual inversion." Similarly, another doctor thought it significant that a male "pervert" "never smoked and

never married; [and] was entirely averse to outdoor games."

28. Such views about gender roles lost their credibility once public opinion had come to accept significant changes in women's roles in the workplace and political sphere, but doctors continued for several more decades to identify homosexuality per se as a "disease," "mental defect," "disorder," or "degeneration." For generations, such hostile medical pronouncements provided a powerful source of legitimation to anti-homosexual sentiment, just as medical science previously had legitimized widely held (and subsequently discarded) beliefs about male superiority and white racial superiority.The medical profession's classification of homosexuality as a defect or disorder also helped spur and legitimate anti-gay law enforcement activity throughout the country.

29. Religiously-inspired hostility to homosexuality also inspired an escalation in anti- gay policing. In the late nineteenth century, native-born Protestants organized numerous "anti-vice" societies to suppress what they regarded as the sexual immorality and social disorder of the nation's burgeoning Catholic and Jewish immigrant neighborhoods. Although these organizations focused on female prostitution and what they regarded as the weakening of moral strictures governing relations between men and women, they also opposed the growing visibility of homosexuality, which they regarded as a particularly egregious sign of the loosening of social controls on sexual expression under urban conditions. They encouraged the police to step up harassment of gay life as one more part of their campaigns to shut down dance halls and movie theaters, prohibit the consumption of alcohol and the use of contraceptives, dissuade restaurants from

serving an interracial mix of customers, and otherwise impose their vision of the proper social order and sexual morality. In New York City in the 1910s and 1920s, for instance, the Society for the Suppression of Vice (also known as the Comstock Society) worked closely with the police to arrest several hundred men for homosexual conduct. In Massachusetts, the Watch and Ward Society, established as the New England Society for the Suppression of Vice, conducted surveillance on virtually all the popular gay bars and gathering places of the time. In Chicago, the 1910 Vice Commission investigated the city's homosexual "resorts."

30. As a result of the pressure from Protestant moral reform organizations, municipal police forces began using misdemeanor charges, such as disorderly conduct, vagrancy, lewdness, loitering, and so forth to harass homosexuals. These state misdemeanor or municipal offense laws, which carried fewer procedural protections than felony sodomy charges, allowed further harassment of individuals engaged in same-sex intimacy. In some cases, state officials tailored these laws to strengthen the legal regulation of homosexuals. For example, in 1923, the New York State legislature specified for the first time that a man's "frequent[ing] or loiter[ing] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness" was a form of disorderly conduct. Many more men were arrested and prosecuted under this misdemeanor charge than for sodomy. Between 1923 and 1966, when Mayor John Lindsay ordered the police to stop using entrapment to secure arrests of gay men, there were more than 50,000 arrests on this charge in New York City alone.

31. The social marginalization of gay men and lesbians gave both the police and the public even broader informal authority to harass them. The threat of violence and verbal harassment deterred many gay people from doing anything that might reveal their homosexuality in public. Gay people knew that anyone discovered to be homosexual risked the loss of livelihood and social respect, so most gay people were careful to lead a double life, hiding their homosexuality from their heterosexual employers and other associates.

B. Censorship

32. The growing visibility of lesbian and gay life in the early twentieth century precipitated censorship campaigns designed to curtail gay people's freedom of speech and the freedom of all Americans to discuss gay issues.

33. The earliest gay activists fell victim to such campaigns. In 1924, when the Chicago police learned that a postal worker had established the country's earliest known gay political group, the Society for Human Rights, they raided his home and seized his group's files. After the raid, the group ceased publication of its short-lived magazine, *Friendship and Freedom*. In the 1910s and 1920s, a handful of plays included lesbian and gay characters or addressed gay themes. But in 1927, after "The Captive," a serious drama exploring lesbianism, opened on Broadway to critical acclaim, New York State passed a "padlock law" that threatened to shut down for a year any theater that staged a play with lesbian or gay characters. Given Broadway's national importance as a staging ground for new plays, this law effectively censored American theater for a generation.

34. Theater censorship occurred in other cities in addition to New York. In the early twentieth century, Boston had a particularly strict culture of "moral purity" censorship, and the phrase "Banned in Boston" was familiar to people throughout the country. In 1935, for instance, Boston Mayor Frederick W. Mansfield banned Lillian Hellman's "The Children's Hour," a play with lesbian themes. Mansfield explained his decision to the press by asserting that the play "showed moral perversion, the unnatural appetite of two women for each other."

35. Such censorship had even wider-reaching effects when it spread to the movies. A censorship movement led by religious leaders threatened the Hollywood studios with mass boycotts and restrictive federal legislation if they did not begin censoring their films. Seeking to avoid federal legislation, the studios established a production code (popularly known as "the Hays Code") that from 1934 on prohibited the inclusion of gay or lesbian characters, discussion of homosexual issues, or even the "inference" of "sex perversion" in Hollywood films. This censorship code remained in effect for some thirty years and effectively prohibited discussion of homosexuality in a powerful communications medium. This censorship stymied and delayed democratic debate about homosexuality for more than a generation.

C. The Great Depression and the Curtailment of Gay People's Freedom of Association

36. In the early years of the Great Depression, restrictions on gay life intensified. By depriving millions of men of their role as breadwinners, the Depression transformed already-existing anxiety over gender roles into a crisis in gender and family relations. Federal, state, and local governments

responded to this perceived crisis with policies that directly affected women and gay people. New Deal public works projects, for instance, which offered jobs only to male heads of households, were designed in part to restore men's status in their families and larger society, even when this meant limiting women's economic opportunities.

37. The apparent fragility of the family and gender arrangements made the visibility of gay life seem more threatening to many people, especially given the long-standing representation of gay men and lesbians as gender deviants. After a generation in which gay life had been relatively visible and integrated into urban public life, restrictions on gay life increased. Gay people were forced into hiding by new laws that pushed gay people out of restaurants and bars, as well as off the stage and silver screen.

38. New regulations curtailed gay people's freedom of association. In New York State, for instance, the State Liquor Authority, established after the repeal of Prohibition in 1933, issued regulations prohibiting bars, restaurants, cabarets, and other establishments with liquor licenses from employing or serving homosexuals or even allowing them to congregate on their premises. The Authority's rationale was that the mere presence of homosexuals made an establishment "disorderly," and when the courts rejected that argument, the Authority began using evidence of unconventional gender behavior or homosexual solicitation gathered by plainclothes investigators to provide proof of a bar's disorderly character. Hundreds of bars were closed for this reason in the next thirty years in New York City alone.

39. Similar regulations were introduced around the country in subsequent years. In California in the

1950s, notes historian Nan Alamilla Boyd, the Alcoholic Beverage Control Board "collapsed the difference between homosexual status (a state of being) and conduct (behavior) and suggested that any behavior that signified homosexual status could be construed as an illegal act. Simple acts such as random touching, mannish attire (in the case of lesbians), limp wrists, high-pitched voices, and/or tight clothing (in the case of gay men) became evidence of a bar's dubious character" and grounds for closing it. In Chicago in 1934-35, Mayor Edward J. Kelly used laws against bawdiness and cross-dressing to shut down almost all the cabarets on the Near North side featuring lesbians, "pansies," or male or female impersonators, on stage or in the audience.

IV. Modern American History: World War II

40. Changes in the policies of the Armed Forces of the United States during the Second World War both reflected and expanded the government's growing campaign of classifying and discriminating against gay citizens. The military had long made sodomy a criminal offense (and, indeed, it continues to do so). But the Second World War marked the first time the military moved beyond criminalizing homosexual conduct to develop policies that systematically endeavored to exclude personnel on the basis of their identity as homosexuals. All of the branches of the armed forces put in place screening mechanisms designed to ferret out homosexuals during the induction process. Thousands of men and women were kept from serving their country, and often faced public opprobrium as a result. Notwithstanding the new prohibition, many gay men and lesbians served in the armed forces in the Second World War, but they had

to be careful to whom they disclosed their sexual orientation.

41. Across the country, notwithstanding legal restrictions, the number of lesbian and gay bars and other meeting places increased during the war years. Military authorities responded to the growth in the number of gay meeting places by collaborating with civil authorities to close them or at least keep servicemen from visiting them. The Army and the Navy created a joint Disciplinary Control Board that worked together with state liquor control agents and municipal police forces to identify and police bars and night clubs, including almost one hundred in San Francisco alone, with the intent of harassing and suspending the licenses of those that served a gay clientele. Military and civilian police also cooperated in anti-vice raids against gay bars and other meeting places. Servicemen who were caught in these raids risked being discharged, and several thousand patriotic Americans who honorably served to defend their country were not honorably discharged solely because of their gay or lesbian identity.

42. Following the war, the Veterans Administration denied GI Bill benefits to soldiers who had received undesirable discharges. Eventually, most other groups of soldiers with such discharges had their benefits restored, but the Veterans Administration steadfastly refused to restore them to homosexuals. This meant that gay veterans who were members of the "Greatest Generation" and who had risked their lives for their country before being discharged were denied the educational, housing, and readjustment allowances provided to millions of their peers.

V. Modern American History: Post-WWII Period

A. Government Policies in the McCarthy Era

43. Even the stepped-up policing of gay life in the 1930s and 1940s did not equal the scale of discrimination faced by gay men and lesbians in the generation following the Second World War. The persecution of gay men and lesbians dramatically increased at every level of government after the war.

44. In 1950, following Senator Joseph McCarthy's denunciation of the employment of gay persons in the State Department, the Senate conducted a special investigation into "the employment of homosexuals and other sex perverts in government." The Senate committee recommended excluding gay men and lesbians from all government service, civilian as well as military. To support this recommendation, the committee argued that homosexual acts violated the law, and it gave its imprimatur to the prejudice that "those who engage in overt acts of perversion lack the emotional stability of normal persons" and that homosexuals "constitute security risks."

45. The committee also portrayed homosexuals as predators: "[T]he presence of a sex pervert in a Government agency tends to have a corrosive influence on his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. Government officials have the responsibility of keeping this type of corrosive influence out of the agencies under their control. . . . One homosexual can pollute a Government office."

46. The Senate investigation and report were only one part of a massive anti-homosexual campaign launched by the federal government after the war. The Senate committee reported that "between January 1, 1947, and August 1, 1950, approximately 1,700 applicants for Federal positions were denied employment because they had a record of homosexuality or other sex perversion." In 1953, President Eisenhower issued an executive order requiring the discharge of homosexual employees from federal employment, civilian or military. Thousands of men and women were discharged or forced to resign from civilian and military positions because they were suspected of being gay or lesbian. At the height of the McCarthy era, the U.S. State Department discharged more homosexuals than communists. The government's purge of its gay employees prompted the founding of some of the earliest gay rights organizations. Frank Kameny, for one, founded the first gay rights group in Washington, D.C. after he was dismissed from his job as a government astronomer for being homosexual in 1957.

47. President Eisenhower's executive order prohibiting federal employment for homosexuals also required defense contractors and other private corporations with federal contracts to ferret out and discharge their homosexual employees. Many other private employers without federal contracts adopted the federal government's policy by refusing to hire gay people. Furthermore, the FBI initiated a widespread system of surveillance to enforce the executive order. As the historian John D'Emilio has noted, "The FBI sought out friendly vice squad officers who supplied arrest records on morals charges, regardless of whether convictions had ensued. Regional FBI officers gathered data on gay bars, compiled lists of other places frequented by homosexuals, and clipped press

articles that provided information about the gay world. . . . Federal investigators engaged in more than fact-finding; they also exhibited considerable zeal in using information they collected."

48. Two years after the Senate committee recommended that homosexuals be purged from government employment, Congress signaled its conviction that homosexuals had no place in American society in the most palpable way possible: by denying them entry into the country. In 1952, Congress prohibited homosexuals (whom it called "psychopaths") from entering the country, much as it previously had prohibited immigration from Asia and curtailed the immigration of Jews and Catholics from eastern and southern Europe. In the case of homosexuals, the prohibition extended beyond people seeking long-term residency or citizenship; a generation of foreign visitors applying for mere tourist visas had to sign statements swearing they were not homosexual before they could make even the briefest trip to the United States.

49. Many state and local governments followed the federal government's lead in seeking to ferret out and discharge their homosexual employees. As a result of these official policies, countless state employees, teachers, hospital workers, and others lost their jobs. Beginning in 1958, for instance, the Florida Legislative Investigation Committee, which had been established by the legislature in 1956 to investigate and discredit civil rights activists, turned its attention to homosexuals working in the state's universities and public schools. Its initial investigation of the University of Florida resulted in the dismissal of fourteen faculty and staff members, and in the next five years it interrogated some 320 suspected gay men and

lesbians. It "pressured countless others into relinquishing their teaching positions, and had many students quietly removed from state universities." Its 1959 report to the legislature called the extent of homosexual activity in the state's school system "absolutely appalling." In addition, in a well-publicized 1949 case in Massachusetts, Dr. Miriam Van Waters, long-time superintendent of the Women's Reformatory at Framingham, was dismissed by the Commissioner of Corrections because she had either not known or had known and had not prevented "an unwholesome relationship" that "existed between inmates of the Reformatory," which had "resulted in 'crushes', 'courtships', and homosexual practises [sic] among the inmates." She was then forced to defend her policies in public hearings held by a Massachusetts house committee over several months.

50. During this period, both federal and local agencies sought to curtail gay people's freedom of speech and the freedom of all people to discuss homosexuality. In 1954, postal officials in Los Angeles banned an issue of the first gay political magazine, *ONE*, from the mails, a ban overturned by the Supreme Court in 1958. In some cities the police continued to shut down newsstands that dared to carry it. In 1957, San Francisco officials arrested Lawrence Ferlinghetti and Shig Murao for publishing and selling "Howl," a poem by Allen Ginsberg that openly proclaimed his homosexuality.

51. Censorship, government-sanctioned discrimination, and the fear of both made it difficult for gay people to organize and speak out on their own behalf. Given the severity of anti-gay policing, for instance, the Mattachine Society, the most significant gay rights organization in the 1950s, repeatedly had to reassure

its anxious members that the police would not seize its membership list. In Denver in 1959, a few weeks after Mattachine held its first press conference during a national convention, the police raided the homes of three of its Denver organizers; one lost his job and spent sixty days in jail.

B. The Demonization of Homosexuals

52. The official harassment of homosexuals received further legitimization from a series of press and police campaigns in the 1940s and 1950s that fomented demonic stereotypes of homosexuals as child molesters out to "recruit" the young into their way of life. In response to a series of local panics over sex crimes against women and children, in which homosexuals were almost never identified as the culprits, numerous local newspapers and national magazines claimed that children faced a growing threat from homosexuals. The press warned that, in breaking with social convention to the extent necessary to engage in homosexual behavior, a man had demonstrated the refusal to adjust to social norms that was the hallmark of the psychopath. In 1950, *Coronet*, a popular national magazine, asserted: "Once a man assumes the role of homosexual, he often throws off all moral restraints. . . . Some male sex deviants do not stop with infecting their often-innocent partners: they descend through perversions to other forms of depravity, such as drug addiction, burglary, sadism, and even murder."

53. The demonization of homosexuals by the press was reinforced by the statements of public officials. A Special Assistant Attorney General of California claimed in 1949 that "[t]he sex pervert, in his more innocuous form, is too frequently regarded as merely a queer individual who never hurts anyone but himself. All too often we lose sight of the fact that the

homosexual is an inveterate seducer of the young of both sexes, and is ever seeking for younger victims." Detroit's prosecuting attorney demanded the authority to arrest, examine, and possibly confine indefinitely "anyone who exhibited abnormal sexual behavior, whether or not dangerous." In 1957, the *Hartford Courant* reported on comments by a Connecticut judge at a criminal sentencing. The judge endorsed jail terms for homosexuals because his "observation" was that homosexuality "ha[d] spread much too far."

54. Such press campaigns and official statements created fearsome new stereotypes of homosexuals as child molesters, which continue to incite public fears about gay teachers and parents as well as other gay people who come into contact with children. Between the late 1930s and late 1950s, public hysteria incited by such press campaigns prompted more than half the state legislatures to enact laws allowing the police to force persons convicted of certain sexual offenses—or, in some states, merely suspected of being "sexual deviants"—to undergo psychiatric examinations. These examinations could result in indeterminate civil confinements for individuals deemed in need of a "cure" for their homosexual "pathology."

C. Another Escalation of Anti-gay Policing

55. During the postwar era, bars became an especially important meeting place for lesbians and gay men because they were often the only public spaces in which people dared to be openly gay. Given their growing importance to gay people as a social center and the growing pressure on the police to enforce regulations prohibiting bars from serving homosexuals, gay bars became an important battleground in the postwar years. Despite the prevailing popular animosity toward homosexuals, state courts

in New York and California issued rulings that curtailed the right of state liquor authorities and the police to discriminate against gay bar patrons. Official antipathy to homosexuals was so strong, however, that police officials circumvented or simply disregarded these judicial decisions.

56. This sharp escalation in the policing of gay life after the Second World War occurred throughout the country. In 1955, for example, the government of Boise, Idaho launched a fifteen-month investigation of gay men in town, interrogating fourteen hundred persons and pressuring men known to be gay to reveal the names of other gay men. Police departments from Seattle and Dallas to New Orleans and Baltimore stepped up their raids on bars and private parties attended by gay and lesbian persons, and made thousands of arrests for "disorderly conduct." By 1950, Philadelphia had a six-man "morals squad" arresting more gay men than the courts knew how to handle, some 200 a month. In the District of Columbia, there were more than a thousand arrests every year. In 1965, the Boston City Council's Committee on Urban Renewal debated whether to bulldoze several downtown gay bars. A proponent of the effort, City Councilor Frederick Langone, gave a speech at the meeting calling for the destruction of "these incubators of homosexuality and indecency and a Bohemian way of life," and insisting that "[w]e must uproot these joints so innocent kids won't be contaminated." Many gay bars were razed in the "revitalization" that followed. In 1969, a Councilman in Rocky Hill, Connecticut called for a nightclub frequented by homosexuals (Alice's Joker Club) to be closed as a "public nuisance" because it was a "threat to the morals" of the town's citizens. From 1933 until the mid 1960s, hundreds of bars that tolerated gay customers

were closed in New York City alone. Some bars in New York and Los Angeles posted signs telling potential gay customers: "If You Are Gay, Please Stay Away" or, more directly, "We Do Not Serve Homosexuals." According to the historian John D'Emilio, raids on gay bars in Chicago in this period were "a fact of life, a danger every patron risked by walking through the door."

VI. The Gay Rights Movement and Its Opponents in the 1970s and 1980s

A. Early Successes of the Gay and Lesbian Rights Movement

57. The dramatic escalation in policing and suppression in the post-war years failed to eradicate gay life. In larger cities, lesbians and gay men covertly patronized bars and restaurants, which they turned into informal meeting places, took over remote sections of public beaches, and held dances and parties. In many smaller towns, gay life took shape unnoticed in church choirs, amateur theaters, and women's softball leagues, and was sustained by closely knit social circles.

58. Nonetheless, most gay men and lesbians responded to the escalation in policing after the Second World War by keeping their homosexuality carefully hidden from non-gay people. They developed elaborate verbal codes that allowed them to communicate with one another while remaining invisible to hostile outsiders. The word "gay" is a good example of this: before the 1970s few heterosexuals realized gay people had given it a distinctly homosexual meaning. But the very success of such subterfuges in concealing gay life made it difficult for gay people to find one another in the 1950s, and it severely limited

the capacity of gay people to organize on their own behalf.

59. The earliest gay rights organizations, the Mattachine Society, *ONE*, and the Daughters of Bilitis, were founded in the early 1950s at the height of the demonization of homosexuals as dangerous, irrational, and unstable pariahs who threatened the nation's children as well as national security. This initial generation of activists worked to meet and educate potential allies among sociologists, psychologists, criminologists, and other professionals who had the credibility to speak on homosexuality that was denied to homosexuals themselves.

60. Gay rights organizations began to influence public policy in the mid-1960s, although the pace of change varied enormously across the country. The New York Mattachine Society's success in 1966 in persuading Mayor John Lindsay to end the widespread police use of entrapment had a profound effect on gay male New Yorkers, who for the first time in decades did not have to worry that the men who approached them in bars and elsewhere were undercover policemen. New York and California state court rulings finally curtailed the policing of gay bars and other meeting places in those states in the 1960s, but in some other parts of the country the police continued to raid gay bars well into the 1970s and 1980s. The growing divergence in the treatment of gay people in different parts of the country prompted a growing number of gay people to migrate from hostile areas to New York, Boston, San Francisco, Los Angeles, Chicago, and other more tolerant cities and regions. This mass migration, in turn, affected the political and cultural climate of those cities and

regions, making them more likely to enact gay rights legislation and similar policies.

61. Major institutions that once helped legitimize anti-gay attitudes also began to change their positions. Medical writers and mental health professionals whose stigmatization of homosexuality as a disease or disorder had been used to justify discrimination for decades were among the first to change their views. In 1973, the American Psychiatric Association voted to remove homosexuality from its list of mental disorders. The American Psychological Association soon followed suit. However, the American Psychiatric Association's decision was fiercely opposed by prominent members of the association such as Charles Socarides and Irving Bieber. They and other medical professionals who claimed homosexuality was a treatable psychological disorder continued to receive considerable attention.

62. Censorship of gay images and speech declined. By the early 1960s, competition from television led the Hollywood studios to reorganize their nearly thirty-year-old censorship code, enabling the studios to make films for adult viewers which addressed "serious themes" such as homosexuality. These themes remained off-limits for television. The studios initially still included very few gay characters in their features, and the television networks included virtually none, but ending formal censorship opened a door that resulted in significant cultural changes in later years.

63. A small but growing number of municipalities enacted legislation protecting people from certain forms of discrimination on the basis of their sexual orientation. In 1972, East Lansing, Michigan, home to Michigan State University, became the first town to do so. Within five years, another twenty-seven

communities passed such legislation, more than half of them university towns such as Ann Arbor, Austin, Berkeley, and Madison. They were joined by a handful of larger cities such as San Francisco, Minneapolis, Seattle, and Detroit. During this same period, however, a number of states enacted new legislation that criminalized homosexual sodomy, even as they decriminalized heterosexual sodomy.

64. Attitudes toward homosexuals and homosexuality in some religious denominations also began to change. Since the 1970s, many mainline Protestant denominations have issued official statements condemning legal discrimination against homosexuals and affirming that homosexuals ought to enjoy equal protection under criminal and civil law. Several of these groups descended from the historically influential denominations whose religious authority had been invoked to justify colonial statutes against sodomy. The Lutheran Church in America, the Unitarian Universalist Association, the United Methodist Church, the United Church of Christ, the Protestant Episcopal Church, the Disciples of Christ, and the United Presbyterian Church in the U.S.A. all issued statements in support of civil rights for gay men and lesbians by 1980.

65. Those seven denominations, however, account for only 10.3 percent of the American population. Many more Americans belong to faith traditions that remain strongly opposed to gay civil rights, including 26.3 percent affiliated with historically white evangelical Protestant churches and 23.9 percent who are Catholics. Leading clergy and laypeople from those churches have played a major role in opposing gay rights measures across the country.

B. Anti-Gay Discrimination in the 1970s and 1980s

66. Gay men and lesbians continued to suffer discrimination at the hands of government officials in the 1970s and 1980s. For example, police continued to raid gay bars in some cities. In 1970, the Connecticut State Motor Vehicle Department refused to renew the drivers license of a man on the grounds that he was "an admitted homosexual and that his homosexuality makes him an improper person to hold an operator's license."

67. Beginning in the late 1970s, the initial success of the gay movement in securing local gay rights legislation, as well as the increasing visibility of gay people in the media, provoked a vigorous, negative reaction. Anti-gay rights advocates drew on pernicious stereotypes developed in previous decades to argue that enacting gay rights laws, permitting gay people to teach, and even simply allowing gay characters to appear on television sitcoms threatened the security of children and the stability of the family.

68. The anti-gay rights campaign of this era was effectively launched in 1977, when Anita Bryant, a prominent Baptist singer and the spokeswoman for the Florida citrus growers, led a campaign to "Save Our Children" from newly enacted civil rights protections for gay men and lesbians in Dade County, Florida. Her success in persuading a decisive majority of Miami voters to vote against the ordinance depended heavily on her use of the still powerful postwar images of homosexuals as child molesters. Her organization published a full-page advertisement the day before the vote warning that the "other side of the homosexual coin is a hair-raising pattern of recruitment and outright seductions and molestation." Her victory in Miami prompted groups in other cities

to take up the cause, and in the next three years, laws extending civil rights protections to gay men and lesbians were repealed in more than a half-dozen bitterly fought referenda stretching from St. Paul, Minnesota to Eugene, Oregon. Gay rights advocates managed to defeat such referenda only in two elections, in November 1978, when Seattle voted to preserve its antidiscrimination ordinance and when California rejected the Briggs Initiative. The Briggs Initiative was a proposal so onerous it would have prohibited public school teachers, gay or straight, from saying anything that could be construed as "advocating homosexuality."

69. The Save Our Children campaign had other far-reaching effects. The day after the Dade County gay rights ordinance was repealed, the governor of Florida signed into law a ban on adoption by lesbians and gay men, the first such statewide prohibition. Thousands of children who might otherwise have had loving parents were thus denied the stability of family life. Similarly, in 1985, the Massachusetts Department of Social Services removed two boys from their foster care placement with a gay male couple and implemented a policy of preferred placement in "traditional family settings." While Massachusetts' ban was reversed in 1990 as a result of litigation, the Florida ban remained in effect until 2010.

70. Across the country, the unfounded fear that homosexuals posed a threat to children itself threatened some children: those already being raised by lesbians and gay men. In the 1970s, most children being raised by lesbian or gay parents had been born before their parents came out as gay. When a parent came out, any dispute over child custody that had to be resolved in court was likely to be heavily influenced

by stereotypes and prejudices. A growing number of such cases reached the courts in the 1970s and 1980s, and in case after case the courts took the custody of children away from a mother or father whose estranged husband or wife used their former spouse's lesbian or gay identity against them. Some courts confronting early disputes of this nature articulated a "per se" rule against custody and visitation claims made by gay and lesbian parents, holding that homosexuality was inherently inconsistent with parenthood as a matter of law.

71. The long-standing association of homosexuals with disease was reinforced in the 1980s by the media's initial sensationalist coverage of AIDS, which frequently depicted homosexuals as bearers of a deadly disease threatening others. Fear of contagion prompted a new wave of discrimination against gay people in medical care, housing, and employment. Media coverage and the government's slow response to the disease also reflected and reinforced the enduring conviction that homosexuals stood outside the moral boundaries of the nation. Even after the name AIDS (Acquired Immune Deficiency Syndrome) replaced the moniker GRID (Gay-Related Immune Deficiency), media reports initially minimized the crisis by reassuring Americans that the "general public" was not at risk, since the disease only affected homosexuals and a handful of other groups, as if gay people were not part of the "general public."

72. The media coverage of AIDS and the numerous campaigns against local gay rights laws had a dramatic effect on public opinion. In 1987, six years after the AIDS crisis unleashed a new wave of fear of homosexuals, public disapproval of homosexuality reached its peak. Polling data showed virtually no

change through the 1970s, but the number of people who declared that homosexual relations were always wrong climbed from 73 percent in 1980 to 78 percent in 1987. In the 1980s, gay rights activists secured the enactment of gay rights ordinances in an additional forty cities, counties, and suburbs, including Chicago, Boston, New York, and Atlanta, bringing the national total to eighty. But these victories often were more difficult to achieve than they had been in the 1970s. In New York City, for example, the law passed the city council only after more than a decade. In Chicago, it took fifteen years of dogged struggle, led primarily by 20th ward Alderman Clifford P. Kelley.

73. National religiously-inspired organizations formed in the 1970s and 1980s, such as the Moral Majority, Focus on the Family, Family Research Council, and Traditional Values Coalition, provided national leadership and coordination to the movement against gay rights and disseminated campaign materials, political strategies, and financial resources to local groups fighting gay rights ordinances.

VII. The Persistence of Anti-Gay Discrimination from the 1990s to the Present

A. Legal Inequality in State Law

74. The spread of AIDS and the escalation of debate over gay rights at the local level fueled a growing polarization of the nation over homosexuality in the 1980s and especially the 1990s. By the end of the 1980s, even cities and states that had managed to pass gay rights laws found those laws under attack from an increasingly well-organized and well-funded opposition. Beginning in 1988, and reaching a crescendo from 1992 to 1994, groups in Colorado, Oregon, Maine, and six other states used anti-gay

referenda and initiatives to challenge gay rights laws, and built local anti-gay rights organizations. In the twenty-five years after Anita Bryant's campaign in Florida, anti-gay activists introduced and campaigned for more than sixty anti-gay rights referenda around the country. Nationwide, gay rights supporters lost almost three-quarters of these contests. In Oregon alone, there were sixteen local anti-gay initiatives in 1993 and another eleven in 1994. Oregon's gay rights supporters lost all but one. In 1993, Cincinnati voters passed Issue 3, which amended the city charter to prohibit the city from extending civil rights protections based on sexual orientation. After five years of litigation the courts let the amendment stand. It was not until 2004 that the Cincinnati votes repealed the amendment.

75. Following Anita Bryant's lead, anti-gay rights activists frequently fomented voter fear of gay people by reviving demonic stereotypes of homosexuals as perverts who threatened the nation's children and moral character. Two videos that repeatedly were screened in churches and on cable television, "The Gay Agenda" and "Gay Rights, Special Rights," juxtaposed discussions of pedophilia with images of gay teachers and gay parents marching with their children in Gay Pride parades. With little subterfuge, the videos depicted homosexuals as child molesters. This message was reinforced by mass mailings and door-to-door distribution of anti-gay pamphlets, which fostered a climate of hostility and fear during the referenda.

76. In 1992, voters in Colorado passed Amendment Two, which amended the state constitution to prohibit any municipality or unit of the government from enacting anti-gay discrimination ordinances or

policies. This amendment repealed the ordinances already enacted by Denver, Boulder, and Aspen. Moreover, it removed from the political arena any future effort to secure anti-discrimination legislation for gay people. In the face of public antipathy to gay people, represented by the success of this and other referenda overturning non-discrimination laws, several legal groups filed a lawsuit, *Romer v. Evans*, challenging the constitutionality of such constitutional amendments. Once again, the courts protected the rights of the minority against the prejudice of the majority. In 1996, the Supreme Court overturned this state constitutional amendment because it withdrew legal protection against discrimination for gay men, lesbians, and bisexuals, but no others.

77. Although a number of states now have extended basic anti-discrimination protections to gay men and lesbians, in twenty-nine states, including Ohio, there is no statutory barrier to firing, refusing to hire, or demoting a person in private sector employment solely on the basis of their identity as a gay man or lesbian. In approximately twenty states there is no statutory or administrative barrier to such discrimination even in state government employment. Similarly, gay men and lesbians remain without statutory protection from discrimination in housing in thirty states, including Ohio. And, despite the critical role played by harassment of gay and lesbian meeting places in enforcing discrimination toward them throughout the twentieth century, gay and lesbian people in Ohio and twenty-eight other states have no statutory protection from discrimination in public accommodations.

B. Legal Inequality in Federal Law

78. At the national level, employment discrimination against gay men and lesbians by federal agencies remained permissible until the late 1990s. Although the outright ban on hiring gay federal employees was lifted in 1975, federal agencies were free to discriminate against gay men and lesbians in hiring and employment decisions until former President Clinton issued a first-of-its-kind executive order forbidding such hiring discrimination in 1998.

79. In 1992, President Bill Clinton's proposal to end the armed forces' policy banning lesbians and gay men from serving in the military sparked a firestorm in the first months of his presidency and revealed how deeply divided the nation remained. The public outcry against his plan (calls to Congress ran a hundred to one against lifting the ban) had been stoked by years of local anti-gay organizing. Opposition to the new policy by both the Pentagon leadership and the public led Congress and President Clinton to enact a new law known as "Don't Ask, Don't Tell," which allowed for the discharge of gay and lesbian soldiers if they acknowledged their sexual orientation under any circumstances, even in private counseling. Discharge of gay men and lesbians from the military continued after "Don't Ask, Don't Tell" became law in 1993. According to the Service members Legal Defense Network, an organization dedicated to assisting military personnel affected by "Don't Ask, Don't Tell," more than 14,000 service members were fired under the law.

80. The repeal of "Don't Ask, Don't Tell" became effective in 2011. Although the repeal was an important advance for gay men and lesbians, it did not restore the careers of the thousands of service

members who had been discharged under the policy. Nor does it protect gay men and lesbians from the significant discrimination that they continue to face in other domains. After years of effort, gay and lesbian advocates and their allies still have not been able to enact any federal legislation that specifically prohibits discrimination in schools, employment, housing, and public accommodations on the basis of sexual orientation. The Employment Non-Discrimination Act, which would extend express employment protections on the basis of sexual orientation, has been introduced regularly since 1994 (and earlier versions as far back as the 1970s) and has never passed both houses of Congress.

C. Discrimination in Adoption, Custody, and Parenting

81. In the 1990s, lesbian mothers and gay fathers continued to risk their parenting rights when their former different-sex spouses used their sexual orientation to try to deny them custody or visitation rights in divorces. By the mid-1990s, courts in most states followed rules that required individualized assessment of a parent's fitness. But as Julie Shapiro's 1996 study of custody cases around the country demonstrated, many courts continued to infuse those individualized assessments with their own prejudice against lesbians and gay men. As she discovered, courts were especially disapproving of lesbians and gay men who were honest about their sexual orientation with their children. In a widely publicized case, a Virginia trial court in 1993 granted a grandmother's petition to take Sharon Bottoms' two-year-old son away from her because, as the trial court judge explained, her lesbian "conduct is illegal . . . a Class 6 felony in the Commonwealth of Virginia." He went on

to declare "that it is the opinion of this Court that her conduct is immoral" and "renders her an unfit parent." Virginia's Supreme Court upheld the trial court's decision terminating Sharon's parental rights despite the presumption favoring her as a natural parent. In doing so, it relied on a wider range of evidence, including the finding that Bottoms' lesbianism would subject her child to social condemnation and thus disturb the child's relationships with peers and the community at large. Some courts had used similar reasoning to remove children from the homes of divorced white mothers who had married or lived with black men, a practice ruled unconstitutional by the Supreme Court in 1984. In that case, *Palmore v. Sidoti*, Chief Justice Warren Burger ruled that "private biases may be outside the reach of the law, but the law cannot directly, or indirectly, give them effect." 466 U.S. 429, 433 (1984). But courts in many states continued to give legal effect to the private bias they assumed existed against lesbian and gay parents by preferring heterosexual parents over gay parents, without regard to other factors bearing on the child's best interests.

82. Gay and lesbian parents continue to be forced by some courts to choose between hiding their gay identities and losing parental rights. As one Texas attorney commented in 1988, "unless [a mother] ended her open lesbian relationship I would have little chance of winning a custody trial." According to Clifford J. Rosky, in 2004, after ordering a gay father not to expose his child to his "gay lover(s) and/or gay lifestyle," a Tennessee trial court sentenced the father to two days in jail for coming out to the child.

83. State and popular efforts that began in the 1970s to ban lesbians and gay men from adopting or

serving as foster parents continued throughout the 1990s and 2000s. For example, in 2000, Mississippi's legislature passed a ban on adoption by same-sex couples that was subsequently signed by the governor. As recently as 2008, Arkansas enacted by popular referendum a ban on foster care and adoption by gay people.

84. Some states enacted laws that bar recognition of out-of-state adoptions by same- sex couples. For example, in 2004, Oklahoma passed the "Adoption Invalidation Law," which stated that Oklahoma "shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction."

85. Some states refuse to allow a biological parent's same-sex partner to adopt the children they raise together. For example, as recently as December 2010, the North Carolina Supreme Court invalidated a second parent adoption by a woman's same-sex partner, holding that a non-biological same-sex partner could not be recognized as a legal parent.

86. During the 1980s and 1990s, gay and lesbian parents continued to face significant obstacles in custody and visitation disputes. Courts continued to demonstrate harsh judgments toward gay and lesbian parents even when a child was conceived with two gay or two lesbian parents intending to raise the child jointly. This was especially evident when the courts had to decide where to place a child when the child's biological mother died and one of her relatives contested the right of her surviving partner, the child's second mother, to continue to raise the child. In a number of cases, courts granted custody to those relatives despite clear evidence that the child wished to remain with her surviving mother.

D. Depiction of Gay Men and Lesbians in the Media

87. With the decline in movie and television censorship and the growing interest in gay people and issues, there was a significant increase in the coverage of gay issues in the media and in the number of gay characters in movies and on television in the 1990s. By the time the immensely popular "Will & Grace" premiered on NBC in 1998, gay and lesbian characters were a more regular part of the television landscape. This exposure changed the dominant representation of homosexuals. Gay people usually appeared in the media in the 1950s as shadowy and dangerous figures, but they now appeared as a diverse and familiar group whose all-too-human struggles and pleasures drew the interest of large viewing audiences.

88. It was not only in the media that heterosexuals began to see gay and lesbian people. Dramatically increasing numbers of lesbians and gay men revealed their homosexuality to their families, friends, neighbors, and co-workers in the 1990s. Polling data suggest the magnitude of the shift. In 1985, only a quarter of Americans reported that a friend, relative, or co-worker had personally told them that they were gay, and more than half believed they did not know anyone gay. Fifteen years later, in 2000, the number of people who knew someone openly gay had tripled to three-quarters of the population. Acceptance of gay men and lesbians and support for civil rights protections increased as growing numbers of heterosexuals realized that some of the people they most loved and respected were gay.

89. It is important not to overstate the results of this nationwide "coming out" experience, however. In

2000, a significant majority of Americans still expressed moral disapproval of homosexuality. Moreover, support for lesbian and gay civil rights and equality continued to show significant regional differences. Polls showed that public opinion in Massachusetts, Connecticut, and Hawaii was the most tolerant. Support for civil rights also was strong in most other states in New England, in New Jersey and New York, and in other regional clusters: Maryland in the mid-Atlantic, Wisconsin, Minnesota, and Illinois in the upper Midwest, and California, Oregon, and Washington on the West Coast. Anti-gay sentiment was strongest in southern states and in the lower Midwest and plains states. The effects of these regional differences could be seen in regional variations in congressional votes on key gay rights issues, in the treatment of gay couples and individuals by state laws, regulations, and court rulings concerning adoption and foster parenting, parental rights, and in the passage of gay rights laws. Only two states—Wisconsin in 1982 and Massachusetts in 1989—enacted legislation banning anti-gay discrimination before 1990. The number rose to eleven by 2000, but eight of the states were in the Northeast or on the Pacific Coast. The rights of gay people continue to vary enormously across the nation.

E. Continued Official, Religious, and Private Condemnation of Homosexuality in the 1990s-2000s

90. Gay people also continue to face discrimination and opprobrium from highly regarded institutions and officials. The Boy Scouts of America, a federally-chartered organization, long insisted that "homosexual conduct is not morally straight," and refused to allow gay people into the organization. *Boy Scouts of*

America v. Dale, 530 U.S. 640, 651 (2000). Earlier this year, when the Boy Scouts announced that it would consider changing its national exclusionary membership policy to allow local leaders to decide whether to allow openly gay participants, the proposal faced a firestorm of opposition. Dozens of conservative and religious groups lobbied against the proposed change as a "grave mistake" and petitioned the Boy Scouts to "show courage" and "stand firm for timeless values"; they succeeded in persuading the Boy Scouts to delay a vote on the issue. Although the national organization ultimately voted to allow gay boys to join the organization, it continues to exclude gay men over the age of 18. Less than a decade ago, the Chief Justice of the Alabama Supreme Court referred, in a judicial opinion, to homosexual conduct as "abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature's God upon which this Nation and our laws are predicated." *Ex Parte H.H.*, 830 So. 2d 21, 26 (2002) (Moore, C.J., concurring).

91. Although the American Psychiatric Association (APA) removed homosexuality from its list of mental disorders in 1973, dissident psychiatrists and psychologists led by Charles Socarides and Joseph Nicolosi established the National Association for Research and Therapy of Homosexuality (NARTH) in 1992. Disagreeing with both the APA and prevailing professional opinion, NARTH continues to disseminate materials claiming a scientific basis for believing that homosexuality is a psychological disorder and a "potentially deadly lifestyle," and that homosexuals can be "healed." NARTH also lectures, partners with religious organizations, supports conversion therapy activities, and files amicus briefs in court cases.

F. Anti-Gay Policing and Private Anti-Gay Violence

92. Although police harassment of gay men and lesbians and their meeting places is not as common as it was some years ago, it continues to be a problem. In 2009, for example, there were highly publicized police raids of gay bars in Atlanta, Georgia, and in Ft. Worth, Texas, where one patron was critically injured.

93. Gay people also continue to face violence motivated by anti-gay bias. A handful of horrific incidents have drawn widespread media attention. In 1984, in Bangor, Maine, 23- year-old Charlie Howard was targeted by three teens due to his sexual orientation. They attacked him and, although he protested that he could not swim, threw him off a bridge into the Kenduskeag Stream, where he drowned. Then, in 1998, Matthew Shepard, a college student in Laramie, Wyoming, was bound, tied to a fence, beaten with a pistol, and left to die because he was gay. Ten years later, Lawrence "Larry" Fobes King, a 15-year-old student at E.O. Green Junior High School in Oxnard, California, was shot and killed in school by a fellow student because of his sexual orientation. But the problem reaches far beyond these three incidents. The FBI reported 1,260 hate crime incidents based on perceived sexual orientation in 1998 and 1,293 in 2011. In 2008, the year of Lawrence King's murder, a national coalition of anti-violence social service agencies identified twenty-nine murders motivated by the assailants' hatred of lesbian, gay, bisexual, or transgender people. The threat of violence continues to lead many gay people to hide their identities or to avoid such commonplace expressions of affection as holding hands with their partners in public.

94. The most vulnerable victims of discrimination are youth. A national study published in December 2010 found that gay and lesbian teenagers are nearly 40 percent more likely than heterosexual teenagers to be punished by schools, police, and the courts. According to the Gay, Lesbian and Straight Education Network's 2009 National School Climate Survey published in 2010, 61.1 percent of lesbian, gay, bisexual, and transgender (LGBT) students surveyed felt unsafe at school because of their sexual orientation; 84.6 percent were verbally harassed because of their sexual orientation; 40.1 percent were physically harassed in the past year because of their sexual orientation; and 18.8 percent were physically assaulted because of their sexual orientation. A recent study sponsored by the New York City Council noted the overrepresentation of LGBT youth among the city's homeless population. And the recent spate of suicides among LGBT youth has highlighted the personal consequences of the ostracism and demonization of gay men and lesbians in American society.

95. One example of the harassment that LGBT youth may face was recounted by Derek Henkle, a high school student in Washoe County School District, Nevada, who sued the District for failing to protect him from anti-gay harassment. *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001). His suit contended that, on one occasion, students lassoed a rope around his neck in the school parking lot and threatened to kill him by dragging him from their truck. On another occasion, Henkle explained he was punched by another student while two school security guards stood by. Henkle also reported that one of his principals told him to "stop acting like a fag." The case resulted in the largest pre-trial settlement of its kind in the nation at the time.

G. Marriage

96. Gay men and lesbians are still prohibited from marrying in the vast majority of states in this country, and the question of marriage rights for same-sex couples remains hotly contested across-the-board. Some of the arguments made in the debate over the right of gay couples to marry have echoed those made in earlier debates over the rights of disfavored minority groups. Fifty years ago, for instance, segregationists often claimed that segregation and statutes banning interracial marriage reflected God's plan for humankind. In the 1960s, a Virginia judge who upheld that state's law against interracial marriage in the lower-court proceeding in *Loving v. Virginia* claimed that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

97. Opponents of the right of gay people to marry or adopt children also have drawn on their reading of scripture to justify their positions. As recently as 2002, when the Supreme Court of Alabama reversed the Alabama Court of Civil Appeals' decision to grant a lesbian mother custody of her children, the Chief Justice of the Supreme Court of Alabama used language as strong as that used by the trial judge in *Loving v. Virginia* in his concurring opinion: "Homosexuality is strongly condemned in the common law because it violates both natural and revealed law. The law of the Old Testament enforced this distinction between the genders by stating that '[i]f a man lies with a male as he lies with a woman, both of them have committed an abomination.' Leviticus 20:13 (King

James) . . . the common law designates homosexuality as an inherent evil, and if a person openly engages in such a practice, that fact alone would render him or her an unfit parent." *Ex parte H.H.*, 830 So. 2d 21, 33, 35 (Ala. 2002).

98. The vigorous opposition to ending discrimination against lesbian and gay couples in marriage law is the latest example of this pattern. The marriage issue first reached the national stage in 1993, when Hawaii's Supreme Court ruled that the state's ban on marriages between same-sex couples presumptively violated the state's equal rights amendment and remanded the lawsuit challenging that ban to a lower court for review. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). By 1996, when a second trial began in the lower court, the prospect of gay couples winning the right to marry had galvanized considerable opposition. Ultimately, while the litigation was pending, Hawaii amended its constitution to give the legislature the authority to limit marriage to different-sex couples, *see* Haw. Const. art. I, § 23, which it did. The Hawaii Supreme Court then dismissed the case as moot. *Baehr v. Miike*, Civ. No. 20371 slip op. at 5-8 (Dec. 9, 1999) (taking notice of constitutional amendment). In addition, under pressure from organizations proclaiming support for "traditional family values," the United States Senate passed the Defense of Marriage Act (DOMA) on the day the Hawaii trial began. The Act provided a federal definition of marriage as the union of one man and one woman and declared that no state needed to give "full faith and credit" to "same-sex marriages" licensed in another state. It also denied federal benefits to such married couples. Fourteen states passed state-level DOMA statutes that year, and another eleven passed such statutes the following year. In 2004, when Massachusetts became the first

state to permit gay couples to marry, a full thirteen states passed constitutional amendments banning such marriages even though twelve of those states already had enacted statutory state DOMAs.

99. Indeed, in each state where gay men and lesbians have achieved the right to marry—either through judicial decision or legislative action—there has been significant and organized action by those opposed to marriage rights for same-sex couples to take that right away. California provides a good—and especially contentious—example. In February 2004, San Francisco Mayor Gavin Newsom instructed city officials to issue marriage licenses to same-sex couples. The California Supreme Court ordered the city to stop doing so the following month, and it later nullified the marriages which had been performed. In 2005, and again in 2007, California's legislature approved bills that would legalize marriage for same-sex couples, but both bills were vetoed by then-Governor Schwarzenegger. In May 2008, the California Supreme Court decided in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) that the privacy and due process provisions of the California Constitution guaranteed the basic civil right of marriage to all individuals and couples, without regard to their sexual orientation. Six months later, on November 4, 2008, California voters approved Proposition 8, adding to the California Constitution the provision "Only marriage between a man and a woman is valid or recognized in California." Same-sex couples immediately sued to prevent the enforcement of Proposition 8, but their efforts were rebuffed by the California Supreme Court in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). The court held that the amendment was lawfully enacted, but that it did not invalidate marriages of same-sex couples performed in California prior to its effective

date. The right of same-sex couples to marry in California was only restored in 2013 after a federal trial court found Proposition 8 unconstitutional, and the U.S. Supreme Court subsequently declined to review the decision on the merits because no appellant had standing. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013)

100. Opponents of marriage equality who supported Proposition 8 mobilized some of the most enduring anti-gay stereotypes to heighten public apprehension. Several television commercials aired by the supporters of Proposition 8, for instance, warned that marriage equality might encourage children to become gay themselves. The approval of California's Proposition 8 along with similar laws and constitutional amendments in forty other states indicates the enduring influence of anti-gay hostility and the persistence of ideas about the inequality of gay people and their relationships.

101. Iowa provides another example. In April 2009, a unanimous Iowa Supreme Court struck down the exclusion of qualified same-sex couples from civil marriage. In response, national organizations opposed to marriage for same-sex couples, such as the National Organization for Marriage and the American Family Association, initiated a campaign for the removal of three of the judges involved in that decision who were subject to retention elections. The campaign was successful, and all three judges were ousted from their position on the bench.

Conclusion

Today the civil rights enjoyed by gay and lesbian Americans vary substantially from region to region and are still subject to the vicissitudes of public

opinion. Like other minority groups, they often must rely on judicial decisions to secure equal rights. The role of the courts in this dispute is reminiscent of earlier disputes in which courts had to confront public opposition to minority rights. In 1948, when the California Supreme Court became the first state supreme court in the nation to overturn a state law banning interracial marriage, it bucked the tide of white public opposition to such marriages. While the United States Supreme Court overturned the remaining state bans on interracial marriage in 1967 in *Loving v. Virginia,* it was not until 2001 that more Americans approved of interracial marriage than disapproved of it. History has vindicated the judges who had the courage and foresight to uphold the constitutional rights of disfavored minorities in the face of majoritarian hostility.

Signed under penalty of perjury under the laws of the United States this 10th day of Oct., 2013.

/s/ George Chauncey, Ph.D.
George Chauncey, Ph.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 10/11/13]

Civil Action No. 1:13-cv-501

JAMES OBERGEFELL, ET AL.

Plaintiffs,

v.

THEODORE E. WYMYSLO, ET. AL.,

Defendants.

Judge Timothy S. Black

EXPERT DECLARATION OF MEGAN FULCHER IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLRATORY JUDGMENT ANDPERMENANT INJUNCTION

I, Megan Fulcher, Ph.D., hereby depose and say as follows:

Preliminary Statement

1. I am an Associate Professor in the Department of Psychology at Washington and Lee University. I have been retained as an expert by the counsel for the plaintiff in connection with the above-referenced litigation *("Obergefell")*. I have actual knowledge of the matters stated in this declaration and could and would so testify if called as a witness.

2. My background, experience and list of publications from the last 10 years are summarized in my curriculum vitae, which is attached as Exhibit A to this report.

3. I received a Bachelor's degree in psychology from Virginia Commonwealth University (1997) and a Ph.D. in psychology from the University of Virginia (2004). While at the University of Virginia, I was mentored by Dr. Charlotte J. Patterson, a preeminent scholar in research on lesbian and gay parents.

4. I have authored publications in the field of child development that appear either in peer-reviewed journals or in books published by academic presses. I publish primarily on children's development in traditional and nontraditional families.

5. I have served as a peer-reviewer for professional journals over the course of my career. I have also served as a reviewer for academic conference presentations as well as for competitive grant applications.

6. I teach extensively on the topics of child development, sexuality, gender-role development and parent-child relationships. I also teach courses on scientific methodology and data analysis.

7. My research interests span a number of topics in the social and emotional development of children. I have studied the social development of children in traditional and nontraditional families. I have conducted research with gay, lesbian and heterosexual parents. Specifically, I am interested in gender development, and focus especially on individual differences in gender development during childhood and adolescence. Most children have detailed knowledge of gender-role stereotypes and report sex-typed behaviors and preferences. However, children adhere to

gender roles with varying intensities, and it is these within-sex individual differences that particularly interest me. I am especially interested in family influences on children's adherence to gender roles.

8. In preparing this declaration, I reviewed the complaint in *Obergefell*, and the materials listed in the Attached Bibliography (Exhibit B). I may rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this declaration, as additional support for my opinions. I also rely on my years of experience in this field, as demonstrated in my curriculum vitae (Exhibit A) and the materials listed there. Although James Obergefell and John Arthur have no children of their own, they have been appointed by friends to serve as their children's guardians in the event of their death. David Michener has three children. I have never met the Plaintiffs and so I do not offer an opinion about their individual capacities to parent.

I. Summary of Ultimate Conclusion

9. Children of lesbian and gay parents do not differ in psychological adjustment or wellbeing from children of heterosexual parents. The skills and processes involved in good parenting do not vary as a function of parents' gender or sexual orientation. The research investigating the efficacy of gay and lesbian parents has been published in rigorous, peer-reviewed journals and has been conducted by respected researchers. Overwhelming evidence supports the idea that parenting competence is not impacted by sexual orientation.

10. Children's adjustment is impacted by parents' behaviors in several ways. Parental warmth and monitoring, the formation of attachment relationships, and parents' financial and emotional resources

are each associated with children's behavioral outcomes and adjustment. The same processes that predict success in heterosexual parents also predict success in gay and lesbian parents. Neither gender nor sexual orientation of parents is associated with differences in these parental behaviors.

II. Psychological Adjustment in Children and Adolescents

11. When children and adolescents are functioning well and are able to cope with the demands of everyday life, they are said to have psychological adjustment. Psychological adjustment also includes an absence of problem behaviors and mental health difficulties. When children are well adjusted they have the skills to build and maintain social relationships and can successfully complete tasks necessary for school and home life. Well-adjusted children are building the skills needed to be happy and productive adults. Children with adjustment problems may show behavior problems at home and at school and may have trouble building friendships and relationships with peers. These children may have difficulty coping with growing demands as they move through development.

III. Parents' Behaviors Impact Children's and Adolescents' Psychological Adjustment

12. There are several parenting processes that have been shown to be associated broadly with children's positive adjustment. These processes include authoritative parenting style, secure attachment with child and between parents, and the availability of both financial and emotional resources.

a. Parenting Style: Research consistently finds that when parents are warm, consistent, and

monitor children's behavior, their children do well. Parents differ in warmth toward children, the discipline they use, how and how much they communicate with children, and the developmental appropriateness of the behavior they expect of their children. Parents who are warm and communicative, who make developmentally appropriate demands, and enforce rules with expressed consequences are known as authoritative parents. In these circumstances children learn important communication and relationship skills as well as self-discipline. Research has consistently indicated that authoritative parenting is associated with more positive adjustment in children.

b. Attachment with child and one another: Attachment is an enduring connection between people that produces a desire for contact as well as feelings of distress during separation. Children form attachment relationships to parents and other important adults. Adults form attachment relationships with their children and with romantic partners. In parenting, attachment relationships are secure when a parent shows sensitivity and synchronicity with an infant, and their play is both emotionally and cognitively stimulating. It is within the context of the early attachment relationships that children create a model of social relationships. This model forms an infant's generalized expectations about the social world. They use the skills they develop in these first relationships to create and maintain other relationships.

i. Children can form attachments with several caregivers. The earliest attachment research focused on attachment relationships between children and mothers. More recent research indicates that in addition to with their mothers, children form secure attachment relationships fathers, teachers, and other caregivers. Indeed, having multiple attachment relationships is associated with positive development and may protect children against the effects of less secure relationships.

ii. Parents' attachment with one another also has an impact on children's adjustment. As children watch parents communicate, resolve conflicts and support one another, they learn important relationship skills to take to their future relationships.

c. Resources: When parents have more financial and emotional resources to draw on, children are better adjusted. Over (number xx) studies over 50 years have indicated that financial security buffers children against many risks for negative adjustment. More financial resources can have a direct impact on children (safer neighborhoods, better schools, stimulating toys and activities) or an indirect impact (less stressed parents, more time with parents). Indeed, parents who are less stressed are able to parent positively and have more well-adjusted children. When parents have more emotional support and less parenting or other stress their children do well.

IV. The Structure of Families Does Not Directly Affect Children's and Adolescents' Psychological Adjustment

13. Over and over again, research has indicated that it is not family structure (who is in the family) that is associated with children's adjustment. Instead, it is family processes (how the family interacts) that influence children's behavior and adjustment. Researchers have examined many structural variables such as number of parents in the home, gender of the parents in the home, biological relatedness of parents, and the sexual orientation of parents.

a. Single Parents: At first glance, it seems that being reared by divorced or never-married parents may have a negative impact on psychological adjustment. Group difference data does show that children in single parent homes are at higher risk for poor adjustment. However, a closer look reveals that a number of important process variables are associated with single parenthood. Two parent families are remarkably better off financially than are single parent families. Single parents report more financial and work stress, which impacts parenting quality. This stress can increase as a result of transitions into and out of marriage. Children show behavior problems both before and after their parents' divorce and also after a parent remarries. This indicates it is not the number of parents that is impacting children's well being but the stress from parental marital transitions. Children in two parent families have more sources of emotional support than do children in single parent homes. Additionally, single parents are always parenting without the

relief a parenting partner may contribute. Finally, people who successfully manage a romantic relationship may be better at successfully parenting. Many of the same skills associated with maintaining an adult relationship are necessary in parent-child relationships.

i. When single parents can continue to use authoritative parenting, maintain and model secure attachment, and offer children financial and emotional resources under the increased stress of single parenthood, children's adjustment is not impacted.

b. Biological relatedness: Research indicates that adoptive parents are able to build strong and secure attachment relationships with their children. When children are adopted early in life by parents who intend to rear that child together, children's adjustment is not different from children being reared by their biological parents. This is true of heterosexual, gay, and lesbian adoptive families. Some studies do show a link between biological relatedness to parents and children's adjustment. In most of these studies the biologically unrelated parent is a parent's new partner who enters the child's life as part of new parental relationship. In these cases, children may have already experienced several parental relationship transitions (single-parenthood, divorce, remarriage). These transitions are associated with poorer child adjustment, thus explaining the link between a lack of biological relatedness and maladjustment. Recent carefully designed studies of gay, lesbian, and heterosexual couples who adopted

small children indicate that these children do as well as children who were either adopted or born to heterosexual parents.

c. Gender of Parents: It has been hypothesized that children of single parents may be at risk because they are not interacting with a particular parent (a mother or a father). It was proposed that children needed to be reared by a parent of each gender in order to develop social competencies. However, research testing this hypothesis with single parents, gay and lesbian parents, and nontraditional heterosexual parents indicate this is not the case. Men and women are equally capable of all the parenting skills needed to rear well-adjusted children. Heterosexual couples still tend to specialize their family labor with mothers doing more nurturing and caretaking work while fathers are more responsible for earning money. These differences in family responsibilities can lead to different parenting behaviors and engagement. Fathers have reported being less involved with the day-to-day care and development of their children. However, when parents divide labor nontraditionally, fathers report having emotional connections and close relationships with their children. Although heterosexual fathers report feeling less competence for childcare tasks, when they are responsible for such tasks, they build skills and competence. Childcare involves learned skills, not intuition, which can be accomplished by anyone involved with children, regardless of their gender or sexual orientation.

d. Sexual orientation of parents: It has been a scientific question as well as a legal question for some time whether children reared by lesbian or gay parents are differently adjusted than those raised by heterosexual parents. Numerous peer- reviewed journal articles over the past 25 years have reported on studies that indicate no differences in children's adjustment as a function of parental sexual orientation. These studies have investigated lesbian and gay parented families in many forms, including: custody after heterosexual marriage and divorce, birth to a gay or lesbian couple using reproductive technology, adoption into gay or lesbian parented families, and gay and lesbian adults serving as foster parents. In each of these family types, the same family processes that predict positive adjustment in the children of heterosexual parents also predict parenting success for gay and lesbian parents. Further, the parenting processes employed by heterosexual, gay, and lesbian parents differ very little from one another.

i. Parenting style: Interview, survey, and observational research indicate that lesbian and gay parents show similar levels of warmth and communication with children across development. The most recent research (Golombok et. al. 2013) indicates that gay and lesbian parents may employ harsh punishment less often than do heterosexual parents. Harsh punishments have consistently been associated with children's poor adjustment.

ii. Attachment: Most research assessing parent and child attachment relationship as a function of parental sexual orientation has looked specifically at adoptive parents. In these families, there is no difference between gay, lesbian, and heterosexual parents and their ability to form secure relationships with children. In other family forms, gay and lesbian parents report having close relationships with their children similar to those of heterosexual parents. Adolescent and young adult children of gay and lesbian parents report secure, close and loving relationships with their parents, similar to those reported by their peers reared by heterosexual parents. In their relationships with one another, parents serve as models of social and attachment behaviors for their children. Lesbian and gay parents report rates similar to heterosexual parents of secure attachment to their partner. Lesbian, gay, and heterosexual parents report similar levels of satisfaction in their relationships with their partners. Studies suggest that gay and lesbian parents may display a less hierarchical relationship model than do heterosexual parents.

iii. Resources: Income levels of parents vary similarly in gay, lesbian, and heterosexual parented households. Parents in each type of household report similar support from their partners. Early fears about gay and lesbian households included that the family would be isolated from extended families or other sources of social support for parents

and children. Evidence indicates that this fear was unfounded; children of lesbian and gay families are as likely to be in contact with grandparents as other children. Parents in each family type are successful at providing other adult role models for their children.

V. The Development of Children with Gay or Lesbian Parents

14. Domains of development: Outside of psychological adjustment, there are several other specific areas of children's development of interest to scientists and legal scholars including cognitive development, peer relationships, and gender role development.

a. Cognitive development: Cognitive development in children measured by standardized intelligence tests, school achievement tests, and grade retention is similar in children of gay, lesbian, and heterosexual parents. Gay and lesbian parents are also reported to be as involved in children's school as are heterosexual parents. Gay and lesbian parents are in as close contact with children's teachers as are heterosexual parents. Parents' involvement with school and contact with teachers are powerful predictors of school success.

b. Peer relationships: Several studies of adolescent and adult children of gay and lesbian parents indicate that these children are as likely to report or remember forming close friendships and enduring typical levels of teasing as do children of heterosexual parents. Parents, teachers, peers, and children report no

peer stigmatization as a result of parental sexual orientation. These children are reported to have similar friendships, activities with friends, and popularity as those reared by heterosexual parents.

c. Gender role development. Early concerns about children of lesbian and gay parents included that they would not be able to display typical gender roles without a parent of each gender. In childhood, the toy and activity preferences of sons and daughters of gay and lesbian parents do not differ from those of the sons and daughters of heterosexual parents. Children of lesbian parents are more likely to be tolerant of others' nontraditional behaviors but do not show any gendered behavior differences compared to children of heterosexual parents. Even this difference in tolerance disappears when parents' gendered attitudes are considered. Parents with less traditional gender role attitudes and behaviors have children less restrained by gender stereotypes, regardless of parental sexual orientation.

15. Development across childhood and adolescence. At different ages, well-adjusted children accomplish different developmental tasks. In infancy, a primary accomplishment for children is to form attachment relationships with caregivers. Research indicates that lesbian, gay and heterosexual parents have similar attachment patterns with children. An important accomplishment of preschoolers is to learn to regulate their emotions and to cope with frustrating situations. Again, there is no difference in emotional regulation based on parental sexual orientation. In adolescence, a key accomplishment is to create close and rewarding

relationships with peers. We see that adolescents reared by gay and lesbian parents are as capable of creating these important friendships, as are children of heterosexual parents. Across developmental stages, different skills are demanded of parents. None of these skills are different for gay, lesbian, and heterosexual parents.

VI. The Mental Health of Gay and Lesbian Parents

16. Sexual orientation is no longer used in any way to diagnose mental health. Homosexuality was removed as a mental health disorder from the DSM, the standard to tool to diagnose mental disorders, over 25 years ago. Mainstream psychological and medical associations agree that gay and lesbian orientations are well within the normal and healthy variations of sexual attraction. The American Psychological Association, the American Academy of Pediatrics, the American Medical Association, the American Academy of Child and Adolescent Psychiatry, and the American Academy of Family Physicians (among others) each have released statements in support of gay and lesbian parents and their ability and rights to rear children. Over 25 years of research consistently revealed that gay and lesbian parents are able to cope with the demands of parenting and report the same psychological adjustment themselves as do heterosexual parents.

VII. The Scientific Merit of Research on Gay and Lesbian Parents

17. The research relied on here has all been published in respected journals with peer-review processes that maintain methodological, analytical, and interpretive soundness. The earliest studies of gay and lesbian parenting often included small

samples and participants recruited through convenience sampling. Recently, however, nationally representative, large, and longitudinal studies have replicated the findings of those early studies: there is no substantial difference in the psychological adjustment or development of children as a function of parental sexual orientation. Studies relied on in this opinion included outcome measurements from several sources (children, parents, teachers, peers, standardized assessments), children in different stages of development (early childhood, middle childhood, adolescence, and young adulthood), and from many family forms (biological, adoptive, foster, blended). In these widely variable studies, the same findings continue to emerge: children reared by lesbian and gay parents are doing as well as children raised by heterosexual parents.

VIII. The Recognition of Legal Same-Sex Marriage Would Benefit Children

18. Parents with legal marriages are more financially secure. If gay and lesbian couples achieve the right to marry or to have their legal marriages recognized by the state in which they reside, their children could benefit from the financial protections afforded to other married couples. Spouses would gain social security, survivor benefits and inheritance rights. It is clear that the death of a parent would have a direct impact on children. Additionally, children's development can be impacted indirectly by the death of their parent if the surviving parent's stress and resources begin to affect their parenting. If these financial protections are afforded to surviving parents it will lessen the financial stress that is associated with poor childhood adjustment. Marriage also would

allow spouses to share employment benefits with their family, which reduces stress related to finances.

19. The legal recognition of marriages also protects children during marital transitions. If legal marriage of gay and lesbian parents was recognized, each parent's relationship with children of that marriage would also be recognized. Noncustodial parents would be better able to retain a connection and maintain attachment relationships with their children.

20. The 2010 Census Report indicates that there are many gay and lesbian couples rearing children together in the United States today. More than 115,000 same-sex couples reported having children in their households. There are estimated to be many more gay and lesbian single adults rearing children in the United States.

Signed under penalty of perjury under the laws of the United States this seventh day of October, 2013.

/s/ Megan Fulcher, Ph.D.
Megan Fulcher, Ph.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 10/11/13]

Civil Action No. 1:13-cv-501

JAMES OBERGEFELL, ET AL.

Plaintiffs,

v.

THEODORE E. WYMYSLO, ET. AL.,

Defendants.

Judge Timothy S. Black

EXPERT DECLARATION OF JOANNA L. GROSSMAN IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

I, Joanna L. Grossman, hereby depose and declare as follows:

I. BACKGROUND AND QUALIFICATIONS

1. I am the Sidney and Walter Siben Distinguished Professor of Family Law at the Maurice A. Deane School of Law at Hofstra University. I have actual knowledge of the matters stated in this declaration and would be prepared to testify if called as a witness.

2. My credentials and experience are summarized in my curriculum vitae, which is attached as Exhibit

A to this declaration. I received a B.A. in Economics from Amherst College in 1990 and a J.D. from Stanford Law School in 1994. I joined the Hofstra Law School faculty in 1999, became a tenured professor in 2005, and a distinguished professor in 2012. I have also taught at American University School of Law, Cardozo Law School, Tulane Law School, University of North Carolina School of Law, and Vanderbilt Law School.

3. I teach in the area of family law, with special emphasis on the history of marriage regulation and the legal responses to modern family forms.

4. I am the co-author or co-editor of three books, including *Inside the Castle: Law and the Family in Twentieth Century America* (Princeton University Press 2011) (with Lawrence M. Friedman), a comprehensive sociolegal history of marriage, divorce and the family. I have also published over 30 scholarly articles, including several that address the history of marriage and divorce in the United States, trends in state regulation of marriage, the law and controversy regarding same-sex marriage, and the rules of interstate marriage recognition. I have given dozens of academic presentations and lectures on the subject of same-sex marriage, state regulation of marriage, and interstate marriage recognition. In addition, I have given lectures and conducted training sessions for lawyers and judges on same-sex marriage law and the history of interstate marriage recognition.

5. I have been retained by Plaintiff's counsel in connection with the above-captioned matter. I am being compensated at a rate of $275 per hour for preparation of reports or declarations, preparing for and giving deposition or trial testimony, and preparing for or attending trial. My compensation does

not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

6. I have been researching and writing about state regulation of marriage since the beginning of the modern same-sex marriage controversy in 1993. During my years in academia, I have written about and studied most every aspect of the same-sex marriage controversy, with special attention to the rules of interstate marriage recognition. I explained the same-sex marriage controversy in detailed historical context in *Inside the Castle*, as well as in two lengthy journal articles entitled *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 *Oregon Law Review* 433 (2005) and *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons From the History of Marriage and Divorce*, 14 *Boston University Public Interest Law Journal* 87 (2004). I have also written an online column about virtually every same-sex marriage development since the passage of the first civil union bill in 2000. The relevant columns are listed in Exhibit B to this Affidavit and available at writ.findlaw.com (2000–2010) or verdict.justia.com (June 2011–present). The book, articles and columns were written after I studied and analyzed numerous historical sources, including cases, statutes, treatises, government documents and various non-legal sources. In preparing this declaration, I have relied on my prior research and writing, my reading of current sources on the issues relevant to this case, and my years of experience teaching and working in the field of family law.

II. SUMMARY OF EXPERT OPINIONS

7. I have been asked for my expert opinion concerning the regulation of marriage in the United

States, with particular emphasis on the treatment of conflicting marriage laws among states.

a. Marriage is both a legal and social institution, with significant public and private consequences for individuals who enter it. Marriage is entered into by consent, but regulated from beginning to end.

b. Marriage is primarily regulated at the state, rather than federal level.

c. By statute, states regulate whether individuals can marry, whom they can marry, and how they can create a legal marriage. States also regulate exit from marriage, dictating whether, when and on what terms couples can divorce or annul legal marriages.

d. States regulate the terms and incidents of ongoing marriage and assign various benefits and burdens on the basis of marital status.

e. The federal government also assigns significant and numerous benefits and burdens on the basis of marital status, deferring in most instances to the state's determination as to the validity of a marriage.

f. Throughout history, states have differed on impediments to marriage–those characteristics or circumstances that prevent an individual or a particular couple from forming a legally valid union.

g. There has never been a national law of marriage, and all efforts to create uniform state laws have failed.

h. The conflicts among state marriage laws, however, have lessened as states have developed shared norms about autonomy, maturity, the inappropriateness of eugenic controls, and equality.

i. Conflicts among state marriage laws arose when couples married in one state and then sought recognition of their union in another—whether because they moved to a new state, had contracted an "evasive" marriage in another state in violation of their home state's laws, or had some transient contact with a state to which the validity of their marriage was relevant.

j. The problems created by non-uniform marriage laws have been resolved through a set of principles providing that states generally ought to recognize valid marriages from sister states regardless of whether they would have authorized the marriage in the first instance.

k. The centerpiece of these interstate marriage recognition principles was the "place of celebration rule," or *lex loci contractus*, which provided that marriages that were valid where celebrated were valid everywhere, while those that were void where celebrated were void everywhere.

l. The general rule was potentially subject to two exceptions for violations of natural law (sometimes understood as "public policy") or positive law (express statutory bans on extraterritorial recognition).

m. Interstate marriage recognition principles were commonly understood to reflect the exercise of comity—respect for the laws and policies of sister states—rather than a constitutional mandate.

n. States differed in the degree to which they recognized or made use of the exceptions to the general rule. Ohio fell on the extreme pro-recognition end of the spectrum, recognizing virtually all, if not all, marriages validly celebrated in a sister state even when clearly contrary to Ohio law and entered into by Ohio residents with the purpose of evading Ohio law.

o. The conflicts among state marriage laws significantly lessened over the second half of the twentieth century as states collectively raised the age when adolescents could marry; distanced themselves from the eugenic principles that informed early marriage laws; developed an understanding of genetics and hereditary conditions that made certain impediments to marriage illogical; and, due to constitutional mandate or changing social norms, ceased banning interracial marriage.

p. The controversy over same-sex marriage has created a non-uniformity of marriage laws that parallels other controversies from the past.

q. Ohio, like many other states, has departed from its traditional approach to interstate marriage recognition by adopting a blanket statutory and constitutional prohibition on recognition of validly celebrated same-sex

marriages. There does not appear to be any historical precedent for this approach.

r. The development in the last several decades of robust protection for the right to marry under the Due Process Clause of the Fourteenth Amendment and strong protection against discrimination under the Equal Protection Clause of the Fourteenth Amendment has likely narrowed the circumstances under which states can validly refuse to recognize marriages from sister states rather than expanded them.

III. BASIS AND REASONS FOR OPINIONS

The Significance of Marriage

8. While the meaning of marriage has changed over time, it has always been premised under American law upon a contract between consenting individuals to enter an indefinite, intimate, monogamous relationship regulated by the state.

9. The contract necessary to form a marriage gives way to a formal status, subject to significant regulation from the state, which defines the terms of entry, the rights and obligations while it endures, and the terms of dissolution through death or divorce.

10. The purposes of marriage are innumerable, but historically have included: formation of stable family relationships; encouragement and enforcement of private rather than public dependency; legitimation of children; clarity of property ownership and creation or preservation of lines of inheritance; and the inculcation of civic values necessary for meaningful participation in democratic government.

11. The legal consequences of marriage are also innumerable, but include: a right of financial support; evidentiary privileges; rights to bestow citizenship on a non-citizen spouse; benefits and burdens under state and federal tax laws; inheritance rights; parental status rights; and pension and Social Security rights.

State Regulation of Marriage

12. From its earliest iteration in the United States, marriage law has been primarily the province of the states.

13. States are generally responsible for crafting their own provisions about the right to marry, eligibility to marry, and the mode of marriage. In other words, state statutes specifically set forth who can or cannot marry, whether prohibited marriages are void or voidable, and the procedural requirements for creating a valid marriage.

14. Through the nineteenth and early part of the twentieth centuries, American states imposed a variety of different restrictions on marriage based on the capacity of the individual to understand marriage, the capacity of the individual to participate in the production of healthy offspring, or the nature of the particular union.

15. The impediments to marriage changed over time, as particular concerns or circumstances animated legislators to make their laws stricter or more lax. These changes were the product of moral, religious, social, political, and economic forces.

16. When amending marriage laws, states did not always move in lock step. State legislatures sought at some points to depart from broader trends in marriage laws, and at other points to join them.

17. Some impediments to marriage were universal in the United States. For example, all states prohibited bigamous (and polygamous) marriages, and all states prohibited consanguineous (incestuous) marriages within a certain degree. Most also prohibited marriages by the "insane" or "imbecilic."

18. Other restrictions were common, but not universal. Because of beliefs about the heredity of certain conditions, several states banned individuals with epilepsy from marrying. Because of concerns about transmission to a spouse and/or effects on future offspring, many states prohibited people with venereal disease, tuberculosis, or addiction to alcohol from marrying. Some prohibited certain types of criminals from marrying.

19. Certain non-universal restrictions were the source of most of the controversies among states.

a. All states imposed a minimum age to marry and a minimum age to marry without parental consent, but states differed significantly in setting those ages. The so-called "common law age for marriage" was 12 for girls and 14 for boys. Some states used this standard, while others imposed a higher minimum age.

b. All but a dozen states banned interracial marriage at some point in history, but many changed or lifted their bans as the twentieth century progressed, which led to greater interstate controversy. The categories of people prohibited from marrying whites varied by region and period in history.

c. Nearly half the states imposed restrictions on remarriage following a divorce, either via a

waiting period or, in some states, a complete ban during the lifetime of the former spouse.

d. Beginning in the middle of the nineteenth century, some states adopted bans on marriages between first cousins because of concerns about the genetic effects on future offspring. Within a few decades, roughly half the states imposed such a restriction.

e. Common-law marriage was never universally allowed. It was common in the nineteenth century, but gradually abolished in many states as concerns about fabricated claims, casual attitudes about marriage, and the need for state control over sexual unions increased. As of 1931, roughly half the states still permitted it.

20. The early marriage laws in Ohio banned marriages that were "nearer of kin than second cousins;" by someone with a living spouse (bigamy); by the insane or imbecilic; by individuals with epilepsy; by habitual drunkards or those drunk or under the influence of drugs at the time of the ceremony; by those with syphilis in a communicable form; and by men under 18 years of age and women under 16 years of age. Ohio permitted common-law marriages until 1991. Although Ohio did ban interracial marriage for a time in the nineteenth century, the statutory ban was repealed in 1887.

Failure of Efforts to Create Uniform Marriage Laws

21. At the height of non-uniformity in the late nineteenth and early twentieth centuries, there was a movement to create uniform marriage laws across the country.

22. One of the primary objectives of the National Conference of Commissioners on Uniform State Laws (NCCUSL) upon its founding in 1892 was to create greater uniformity of marriage and divorce laws.

23. Although many states shared the frustration of having their strict marriage standards undermined by their neighbors' laxer ones, states were, by and large, unwilling to agree to a more uniform approach. The Uniform Marriage and Marriage Regulation Law, promulgated in 1911, tackled only the procedural aspects of marriage and was adopted only by two states. A 1950 act relating to marriage was also primarily procedural and sparsely adopted.

24. Of great concern in some states, particularly in the first decades of the twentieth century, was the rise of evasive marriage practices–leaving one's home state to contract marriage (for which residency is never required) in another state and then returning home and seeking recognition of the union. This practice was seen as undermining the ability of states to maintain their own standards. To minimize the practice, NCCUSL promulgated the Uniform Marriage Evasion Act in 1912, which provided that evasive marriages would not be recognized in the couple's home state. However, only five states adopted this law.

25. There were several attempts in the late nineteenth and early to mid-twentieth century to amend the federal Constitution to ban certain types of marriages (interracial ones, for example) or to give Congress the authority to set national marriage policy. None became law.

Reconciling State Marriage Law Conflicts: The Traditional Approach

26. The variation in marriage laws described above gave rise to predictable conflicts about the portability of marriage, particularly as Americans became more mobile and had greater access to modern forms of transportation.

27. The principle of comity, or courtesy among political entities, was the historical touchstone for analyzing marriage recognition questions. That principle informed conflict of laws principles as applied to out-of-state marriages.

28. All jurisdictions followed some version of *lex loci contractus* in evaluating the validity of a marriage. Under this general rule, often called the "place of celebration" rule, a marriage that was valid where celebrated was valid everywhere, and a marriage that was void where celebrated was void everywhere.

29. The first exception to the general rule, the so-called "universal" exception, authorized courts to refuse recognition to marriages that were thought to violate "natural law." In early twentieth century treatises and case law, this exception is described as applying to closely incestuous marriages, such as between a brother and sister or ancestor and descendant, and to bigamous or polygamous unions. Despite the vehement opposition to interracial marriage in the states that banned it, courts seldom applied the universal exception to preclude recognition because such marriages were generally not deemed to violate "natural law."

30. The second exception to the general rule, the so-called "positive law" exception authorized courts to refuse recognition where the legislature had declared

certain marriages invalid or void as against public policy. The most common application of this exception was to evasive marriages in those states with a specific policy, embodied in a statute, against marriage evasion. As noted above, five states adopted the Uniform Marriage Evasion Act to express such a policy, and fifteen other states had evasion laws of some type on the books as of 1931. Beyond evasive marriages, there was little consensus on the meaning of the positive-law exception. Simply prohibiting a particular marriage was not sufficient to justify application of the exception, for that would mean that states would never give effect to marriages that they would not have authorized in the first instance. Courts looked, instead, for statutory language that went beyond the usual prohibition or directly addressed the question of extraterritorial recognition. As leading treatise-writer Joseph Vernier wrote, "[m]arriages are prohibited for many reasons but are void for few" Chester G. Vernier, 1 American Family Laws § 45 (Jan. 1, 1931).

31. As applied to a wide variety of marriage recognition cases in many states, certain trends emerged:

a. Common law marriages were routinely recognized in states that had abolished them by statute.

b. Interracial marriages were often recognized in states that prohibited them by statute, especially if they were non-evasive, i.e. contracted by residents of a state that allowed them.

c. Remarriages following divorce in violation of statutory waiting periods were almost always recognized by states other than the one that

had imposed the restriction in the first instance.

d. Marriages by minors below the age of consent were treated inconsistently, in part because of procedural variations such as whether the proceeding was brought by the minor or by her parent or guardian and whether the proceeding was to annul or confirm the marriage.

32. Historically, Ohio courts have taken a very pro-recognition approach to prohibited marriages. This approach is demonstrated as follows:

a. Ohio follows the place of celebration rule strictly.

b. Ohio has never, to my knowledge, applied the universal or natural law exception to refuse recognition to a prohibited out-of-state marriage.

c. To my knowledge, Ohio never had a marriage evasion statute, nor refused to give effect to a prohibited marriage because it was evasive.

d. Until the adoption of the mini-DOMA in 2004, the Ohio legislature has never, to my knowledge, passed a law denying extraterritorial recognition to a prohibited marriage.

e. Applying the general principle of *lex loci contractus*, Ohio courts have given effect to out-of-state first-cousin marriages, marriages by a minor below the age of consent, and proxy marriages, all of which are prohibited by Ohio law.

33. The hallmarks of the traditional system of interstate marriage recognition were: (i) courts

decided whether to recognize individual marriages on a case-by-case basis; (ii) the consequences of recognizing or failing to recognize the marriage were often more important to the outcome than the nature of the particular marriage (e.g., a polygamous marriage from abroad might be recognized for a limited purpose such as inheritance after the death of one party because recognition would not involve condoning an ongoing polygamous union); and (iii) the law tilted strongly in favor of recognition.

34. Courts were most likely to recognize prohibited out-of-state marriages, even ones that clearly violated the state's public policy, for purposes like inheritance or wrongful death because the marriage would no longer be ongoing.

35. Strong policies supported the pro-recognition tilt of the system, including the desire to: avoid de-legitimating children who had been born into a valid marriage; to protect the parties' expectations as they had likely ordered significant aspects of their lives based on marital status; and to protect both parties against unilateral dissolution by the other. A leading conflicts of law scholar urged a blanket rule of recognition because the "minor inconveniences" of recognition were outweighed by "[I]ntroducing distinctions as to the designs and objects and motives of the parties, to shake the general confidence in such marriages, to subject the innocent issue to constant doubts as to their own legitimacy, and to leave the parents themselves to cut adrift from their solemn obligations when they may become discontented with their lot." Joseph Story, Commentaries on the Conflicts of Laws 215 (9th ed. 1883).

36. These traditional principles of interstate marriage recognition are in full force today outside of

the same-sex marriage context. Although there are fewer conflicts between marriage laws and thus fewer cases, a modern conflict of laws treatise notes the "overwhelming tendency" in the United States to grant recognition to marriages valid where celebrated. William M. Richman & William L. Reynolds, Understanding Conflict of Laws 362 (2d ed. 1993).

Modern Variations in Marriage Laws

37. The differences in state marriage laws that had been so pronounced in the first half of the twentieth century had all but disappeared by the second half. This was the result of converging social norms and the U.S. Supreme Court's decision in *Loving v. Virginia* in 1967, in which it held that state marriage laws must comply with federal constitutional guarantees and that anti-miscegenation laws violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

38. A snapshot of state marriage laws in the 1990s, before the onset of the controversy over same-sex marriage, reveals a remarkably uniform system.

a. All states prohibit bigamous marriage.

b. All states prohibit incestuous marriage within a certain degree.

c. No state prohibits marriage based on physical, mental, or behavioral conditions because of the fear of inherited traits.

d. No state bans interracial marriage.

e. Almost every state sets the minimum to age to marry at 18 without parental consent and 16 with parental consent.

f. No state bans remarriage following divorce, and very few impose a waiting period for remarriage.

39. The most significant variations in modern marriage laws, apart from same-sex marriage, involve first-cousin marriages (permitted by roughly half the states) and common-law marriage (permitted in roughly one-fifth of the states).

The Laws For and Against Same-Sex Marriage

40. The non-uniformity of state laws on same-sex marriage dates to the mid-1990s. As of 1995, no state expressly authorized same-sex marriage, but very few states expressly prohibited it either. The passage of laws for and against same-sex marriage began in 1996 when it appeared imminent that Hawaii might legalize same-sex marriage (although it never did).

41. In 1996, Congress enacted the Defense of Marriage Act (DOMA), which provided that the definition of marriage was a union between a man and a woman for all federal law purposes and that states were not obliged by full faith and credit principles to give effect to same-sex marriages validly celebrated elsewhere.

42. In DOMA's wake, states began passing anti-same-sex marriage laws, which typically did two things: (1) prohibited the establishment of same-sex marriages within the state's borders; and (2) prohibited the recognition of same-sex marriages validly celebrated in sister states or foreign jurisdictions. Some state legislatures, such as those in Kentucky and Virginia, went further and prohibited private contracts intended to replicate the incidents of marriage such as cohabitation agreements.

43. At the high point of the anti-same-sex marriage movement, forty-four states had passed so-called mini-DOMAs to prevent the celebration and recognition of same-sex marriages. Twenty-nine also enacted constitutional amendments saying the same thing in order to avoid invalidation of the statute by court ruling.

44. In 2004, the Ohio Legislature adopted a provision declaring that "any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state." It also provides that "Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state." Ohio Rev. Code Ann. § 3101.01(C) (West 2013).

45. Also in 2004, Ohio voters, by referendum, approved an amendment to the state constitution to provide: "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." Ohio Const. art. XV sec. 11.

46. Although states began passing anti-same-sex-marriage laws in the mid-1990s, it was not until 2004 that the first American state to legalize same-sex marriage, Massachusetts, began issuing licenses to same-sex couples. As of 2013, thirteen states and the District of Columbia have authorized same-sex

marriages, by judicial ruling, voter referendum, or legislative action. Several additional states do not allow same-sex marriage, but do authorize an alternative status for same-sex couples such as civil union.

Non-Recognition of Same-Sex Marriage Laws: Departure from Tradition

47. The problems of non-uniformity and the potential for interstate and intergovernmental conflicts have been resurrected by this patchwork of laws allowing and prohibiting same-sex marriage. Resolution of these conflicts has been made difficult, if not impossible, by the widespread adoption of non-recognition laws at the federal and state level.

48. The state/federal conflicts were contained or eliminated when the U.S. Supreme Court invalidated the Defense of Marriage Act in *United States v. Windsor*, 133 S. Ct. 2675 (2013). After *Windsor*, and federal regulations and agency actions designed to implement it, valid same-sex marriages are recognized for most federal-law purposes. The state-to-state conflicts, however, remain due to the existence of mini-DOMA statutes and constitutional amendments.

49. These laws have imposed significant hardship on married same-sex couples, including:

a. The inability to divorce after moving from a state that allows same-sex marriage to a state that does not. *See, e.g., In re J.B.*, 326 S.W.3d 654 (Ct. App. Tex. 2010) (refusing to recognize Massachusetts same-sex marriage for purposes of granting a divorce). Lack of access to divorce (including equitable distribution and spousal support) has been one of the most significant problems arising from the lack of

interstate recognition of same-sex marriages. This problem exists in part because the states, including those that authorize same-sex marriage, generally do not require residency as a prerequisite to marriage, but they do require residency as a prerequisite to divorce.

b. The inability to obtain benefits from public employers like spousal health insurance. *See, e.g., Bassett v. Snyder*, 2013 U.S. Dist. LEXIS 93345 (temporarily enjoining Michigan from enforcing law prohibiting public employers from providing same-sex partner benefits).

c. The inability to live with a spouse or civil union partner because the union is not recognized and therefore violates a child custody order barring cohabitation by a custodial parent with a non-marital partner. *See, e.g., Burns v. Burns*, 253 Ga. App. 600 (2002) (refusing to recognize civil union for purposes of custody agreement's ban on non-marital overnight guests).

d. The ability of one spouse to avoid the obligations of marriage (including the restriction on bigamy) by moving to a state that does not recognize same-sex marriage.

e. Uncertainty and the potential for protracted litigation about parentage status vis-à-vis the biological child of a same-sex spouse. *See Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2007).

50. Unlike with past interstate marriage conflicts, state courts in mini-DOMA states have been categorically deprived of the power to decide, on a case-by-case basis, whether to give effect to an out-of-state

marriage. The blanket prohibition embodied in statutes like Ohio's § 3101 preclude consideration of relevant facts as well as relevant state policies that might militate in favor of recognition in a particular case.

51. Like most states, Ohio has never adopted a blanket prohibition on interstate marriage recognition other than the one it currently applies to same-sex marriages. But for the statutory and constitutional amendments barring recognition, the traditional rules followed in Ohio would dictate recognition of same-sex marriages as long as they were valid where celebrated.

The Changing Role of Federal Law in Regulating Marriage

52. Despite the significant variations among state marriage laws and some significant conflicts between states, federal law traditionally played no role determining the validity of marriage. Noting the lack of federal marriage rules or principles, the Supreme Court wrote in 1888 that "Marriage, as the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

53. Until 1967, when the U.S. Supreme Court struck down Virginia's ban on interracial marriage in *Loving v. Virginia*, federal law had never been invoked to invalidate a state law on marriage or divorce,

despite numerous interstate conflicts. Federal law contained no substantive norms that could be brought to bear on state marriage law, and the Supreme Court never opined as to the proper definition of marriage.

54. The U.S. Supreme Court did weigh in on state conflicts over divorce because divorce decrees are judgments that are subject to the requirements of full faith and credit. *See, e.g., Williams v. North Carolina*, 317 U.S. 287 (1942). Marriage, however, was not deemed subject to those rules.

55. There is no general federal law of marriage. Instead, most federal laws that assign benefits or burdens on the basis of marital status (and there are over 1000) defer to state law, either the individual's home state or the state in which the marriage was celebrated. Congress's decision in the Defense of Marriage Act of 1996 to refuse federal-law recognition to marriages validly celebrated under state law was unprecedented, and, at least in part for that reason, struck down by the Supreme Court in *Windsor*.

56. Despite the lack of a federal definition of marriage, the Supreme Court's ruling in 1967 in *Loving v. Virginia* that anti-miscegenation bans are unconstitutional signaled the beginning of a new era in which state marriage laws would have to comport with developing constitutional principles of equal protection and due process.

57. Over the course of three opinions, the Supreme Court recognized a fundamental right to marry that prevents states from directly and substantially interfering with one's right to marry without triggering heightened judicial scrutiny. *See Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Turner v. Safley*, 482 U.S. 78 (1987).

58. In addition, the Supreme Court has applied equal protection principles to invalidate federal and state laws that single out gays and lesbians for disadvantageous treatment, including in the context of marriage law. *See United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Romer v. Evans*, 517 U.S. 620 (1996).

59. At the time the rules of interstate marriage recognition were developed, these constitutional constraints did not exist.

Conclusion

60. The categorical refusal to recognize same-sex marriage is a significant deviation from the traditional historical approach that militated strongly in favor of recognition of prohibited out-of-state marriages. The departure from tradition is even more striking in a state like Ohio, which did not recognize an exception to the place of celebration rule for evasive marriages.

Signed under penalty of perjury this 10th day of October, 2013.

/s/ Joanna L. Grossman
Joanna L. Grossman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 10/11/13]

Case No. 13-cv-501

JAMES OBERGEFELL, ET AL,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, ET AL.

Defendants.

Judge Timothy S. Black

EXPERT DECLARATION OF BERNARD L. MCKAY IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

I, Bernard L. McKay, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury under the laws of the United States of America that the following are my true and correct opinions:

I. Summary of Expert Opinions

1. Married same-sex couples living in states such as Ohio that do not recognize their marital relationship face many estate planning and probate challenges not encountered by married heterosexual couples.

2. While certain estate planning instruments (such as wills, trusts and powers of attorney) may be implemented by married same-sex couples, those documents alone do not provide the full array of benefits and protections afforded to married heterosexual couples.

3. Until laws are applied equally to all married couples, married same-sex couples living in Ohio will need to continue exploring various legal alternatives in which to protect their families and wealth.

II. Expert Background and Qualifications

4. I am a licensed and practicing attorney at law, admitted to the bar in the State of Ohio in 1994 and in the Commonwealth of Kentucky in 1995.

5. I am a Member of the law firm of Frost Brown Todd LLC, 3300 Great American Tower, 301 East Fourth Street, Cincinnati, Ohio 45202, where I have been employed since August 1994 and practice primarily in the areas of estate planning, probate and trust administration. I currently serve as the Chair of the Personal and Succession Planning Practice Group.

6. I am a Fellow in the American College of Trust and Estate Counsel, and currently serve as a member of the Professional Responsibility Committee and the State Laws Committee.

7. I am certified by the Ohio State Bar Association as a specialist in estate planning, trust and probate law.

8. I am a member of the Cincinnati Estate Planning Council.

9. I am a member of the Cincinnati Ohio Bar Association, where I served as Chair of the Estate Planning and Probate Committee in 2004-2005, and

previously served as Chair of the Advanced Estate Planning and Probate Institute Committee.

10. I am a member in good standing with the American Bar Association, the Ohio State Bar Association, the Commonwealth of Kentucky Bar Association, the Cincinnati Ohio Bar Association and the Northern Kentucky Bar Association.

11. In addition to several charitable and civic board responsibilities, I currently serve on the Cincinnati Ohio Opera's Planned Giving Advisors Committee, the Cincinnati Ohio Bar Foundation's Planned Giving Committee and the Mercantile Library Planned Giving Advisory Council.

12. My background and experience are hereinabove referenced, and my presentations and publications are provided in detail in my bibliography attached as Exhibit A to this declaration.

13. I have never testified as an expert, either at trial or through declaration, nor have I been deposed as an expert.

14. The statements, conclusions and opinions included in this declaration are based upon my own research and experience.

15. I am being compensated at the rate of $375 per hour.

III. Statutory Protections That Apply to All Married Heterosexual Couples Living in Ohio But Are Not Available To Married Same-Sex Couples Living in Ohio

16. When a married individual domiciled in Ohio dies, his or her surviving spouse is granted numerous property rights as a matter of law. Such rights include, among other things, the right to receive a portion of

the deceased spouse's estate assets regardless of the provisions of the deceased spouse's will, the right to receive a family allowance, the right to remain in the mansion house free of charge for a period of time following the spouse's death, as well as the entitlement to receive notification at certain times throughout the deceased spouse's estate administration process. A surviving spouse is also considered in the distribution of damages awarded in a civil action for wrongful death. Such privileges are granted to surviving spouses only; not to domestic partners, individuals who have entered into a civil union or other couples who are considered unmarried by the State of Ohio. Under Ohio law, when an Ohio domiciliary who was in a valid same-sex marriage dies, the estate administration process unfolds as if the deceased individual had died unmarried.

17. When an individual domiciled in Ohio dies, their death certificate reflects their marital status and, if married, the identity of their spouse. Death certificates have evidentiary value in both the private and public sector. Financial institutions universally advise surviving spouses to obtain multiple certified copies of death certificates upon the death of their loved ones.[1] The Vanguard Group advises surviving spouses that "you generally won't be able to do anything regarding your spouse's assets without certified copies of the death certificate."[2] In the public sector, a death certificate is required for a surviving

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[1] *E.g.*, Fifth Third Bank–Death of a Spouse, https://www.53.com/site/personal-banking/planning-center/lc-death-of-a-spouse.html (last visited Sept. 18, 2013).

[2] The Vanguard Group Inc., Surviving spouse checklist (2010), https://retirementplans.vanguard.com/segment/pdfs/SSChecklist.pdf.

spouse to claim an interest worth up to $40,000 in one or two of the decedent's separately titled vehicles. Ohio Rev. Code § 4505.18.[3] Under this statute, the decedent's interest passes outside of the estate; so if the surviving spouse is entitled to less than the full estate, receiving the vehicles outside the estate may increase the overall inheritance of the surviving spouse. Granted, in both the preceding examples, the death certificate may not serve as the sole evidence of marriage (for the title transfer, surviving spouses must also sign an affidavit swearing they are the surviving spouse), and may serve more as evidence of death, but the death certificate is one form of supporting evidence of marriage.

18. This declaration outlines certain statutory rights granted to the surviving spouse of an Ohio decedent and the estate planning issues often taken into consideration by married same-sex couples living in the State of Ohio who recognize that such legal protections are not extended to their marital relationship.

IV. Probate Administration

19. Chapter 2106 of the Ohio Revised Code is entitled "Rights of Surviving Spouses." As a matter of Ohio law, by virtue of being the surviving spouse of a decedent, (s)he possesses numerous property rights in the decedent's estate and is entitled to be notified on

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[3] *See also* Ohio Bureau of Motor Vehicles, Vehicle Titling—Frequently Asked Questions, http://bmv.ohio.gov/faq_vehicle_titling.stm (last visited Sept. 18, 2013); and Hamilton County Clerk of Courts, Auto Title—Frequently Asked Questions, http://www.courtclerk.org/autotitle_faq.asp (last visited Sept. 18, 2013).

certain occasions throughout the estate administration proceedings.

20. For example, ORC §2106.01(A) provides that after the initial appointment of an administrator or executor of a decedent's estate, the probate court shall issue a citation to the surviving spouse to elect whether to exercise the surviving spouse's rights under Chapter 2106 of the Revised Code, including, after the probate of a will, the right to elect to take under the will or under §2105.06 of the Revised Code.

21. Chapter 2106.01(C) provides that if the surviving spouse elects to take under §2105.06 of the Revised Code, the surviving spouse shall take not to exceed one-half of the net estate, unless two or more of the decedent's children or their lineal descendants survive, in which case the surviving spouse shall take not to exceed one-third of the net estate.

22. Ohio Revised Code §2106.03 provides that the surviving spouse may file a complaint in the probate court, making all persons interested in the will defendants, that requests a construction of the will in favor of the surviving spouse and for the court to render a judgment to that effect.

23. Ohio Revised Code §2106.10(A) provides that a surviving spouse may elect to receive, as part of the surviving spouse's share of an intestate estate under §2105.06 of the Revised Code and the allowance of support under §2106.13 of the Revised Code, the entire interest of the decedent spouse in the mansion house. Revised Code §2106.10(F) provides that the mansion house includes the decedent's title in the parcel of land on which the house is situated and, at the option of the surviving spouse, the decedent's title and the household goods contained within the house and the

lots or farmland adjacent to the house and used in conjunction with it as the house of the decedent.

24. Ohio Revised Code §2106.13(A) provides that if a person dies leaving a surviving spouse and no minor children or leaving a surviving spouse and minor children, the surviving spouse, minor children, or both shall be entitled to receive in money or property the sum of $40,000 as an allowance for support. If the surviving spouse selected two automobiles under Revised Code §2106.18, the allowance for support proscribed by this Section shall be reduced by the automobile having the lower value of the two automobiles so selected. Section 2106.13(B) provides that if the person died leaving a surviving spouse and no minor children, the probate court shall order the distribution of 100% of the family allowance to be paid to the surviving spouse. If the person died leaving a surviving spouse and minor children, and if all of the minor children are the children of the surviving spouse, again the probate court shall order the distribution of 100% of the family allowance to the surviving spouse. Alternatively, if the person died leaving a surviving spouse and minor children, and if not all the minor children are children of the surviving spouse, the family allowance shall be distributed in equitable shares as fixed by the Probate Court, to the surviving spouse and the minor children who are not the children of the surviving spouse.

25. Ohio Revised Code §2106.15 provides that a surviving spouse may remain in the mansion house free of charge for one year, except that such real property may be sold within that time for the payment of debts of the decedent. If the real property is so sold, the surviving spouse shall be compensated from the

estate to the extent of the fair rental value for the unexpired term.

26. Ohio Revised Code §2106.16 provides that a surviving spouse, even though acting as executor or administrator, may purchase certain property left by the decedent if such property was not specifically devised or bequeathed under the provisions of the decedent's will.

27. Ohio Revised Code §2106.18 provides that upon the death of a married resident who owned at least one automobile at the time of death, the interest of the deceased spouse in up to two automobiles that are not transferred to the surviving spouse due to joint ownership with the right of survivorship and are not transferred to a transfer-on-death beneficiary and that are not otherwise specifically disposed of by the testamentary disposition may be selected by the surviving spouse. This statute further provides that this interest shall immediately pass to the surviving spouse upon the transfer of the title and the sum total of the values of the automobiles selected by surviving spouse shall not exceed $40,000.

28. Ohio Revised Code §2106.19 provides that upon the death of a married resident who owned at least one watercraft, one outboard motor, or one of each at the time of death, the interest of the deceased spouse in one watercraft, one outboard motor, or one of each that is not otherwise specifically disposed of by testamentary disposition and that is selected by the surviving spouse immediately shall pass to the surviving spouse.

29. Ohio Revised Code §2106.20 provides that a surviving spouse is entitled to a reimbursement from the estate of the decedent for funeral and burial

expenses, if paid by the surviving spouse, to the extent that the rights of other creditors of the estate will not be prejudiced by the reimbursement.

30. In addition to the rights afforded to surviving spouses under Chapter 2106 of the Ohio Revised Code, other protections exist for surviving spouses. For example, when a married Ohio domiciliary dies without a will other laws apply as to the administration of the deceased spouse's estate as well as the distribution of the deceased spouse's property. More specifically, Ohio Revised Code §2105.06 provides that when a person dies intestate having title or right to any personal property, or to any real property or inheritance, in this state, the personal property shall be distributed and the real property or inheritance shall descend and pass in parcenary, in the following course:

> (a) if there is a spouse and one or more children of the decedent or their lineal descendants surviving, and all of the decedent's children who survive or have lineal descendants surviving also are children of the surviving spouse, then the whole to the surviving spouse;
>
> (b) if there is a surviving spouse and one child of the decedent or the child's lineal descendants surviving and the surviving spouse is not the natural or adoptive parent of the decedent's child, the first $20,000 plus one-half of the balance of the intestate estate to the spouse and the remainder to the child or the child's lineal descendants, per stirpes;
>
> (c) if there is a spouse and more than one child or their lineal descendants surviving, the first $60,000 if the spouse is the natural or adoptive

parent of one, but not all, of the children, or the first $20,000 if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the spouse and remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes; and

(d) if there are no children or their lineal descendants, then the whole estate to the surviving spouse.

31. Ohio Revised Code §2113.06 provides that the administration of an estate of an intestate shall be granted to the persons mentioned in the following order: to the surviving spouse of the deceased, if resident of the state; afterwards, to one of the next of kin of the deceased, resident of the state.

32. Chapter 2113 of the Ohio Revised Code further deals with the appointment, powers and duties of executors and administrators. Ohio Revised Code §2113.05 provides that when a will is approved and allowed, the probate court shall issue letters testamentary to the executor named in the will, if the executor is suitable, competent, accepts the appointment and gives bond if that is required. If no executor is named in a will or if the executor named in a will dies, fails to accept the appointment, resigns or is otherwise disqualified, letters of administration with the will annexed shall be granted to a suitable person or persons, named as devisees or legatees in the will, who would have been entitled to administer the estate if the decedent had died intestate, unless the will indicates an intention that the person or persons shall not be granted letters of administration.

33. Ohio Revised Code §2113.07 provides that before being appointed executor or administrator, every person shall make and file an application that shall contain the names of the surviving spouse and all the next of kin of the deceased known to the applicant and that the application may be accompanied by a waiver signed by the persons who have priority to administer the estate, and, in the absence of a waiver, those persons shall be served notice for the purpose of ascertaining whether they desire to take or renounce administration.

34. Ohio Revised Code §2109.07 provides that a bond required of an administrator shall not be required in either of the following cases: (1) it shall not be required of a surviving spouse to administer the deceased spouse's estate if the surviving spouse is entitled to the entire net proceeds of the estate and (2) it shall not be required of an administrator to administer an estate if there is no will, if the administrator is the next of kin, and if the administrator is entitled to the entire net proceeds of the estate.

35. Ohio Revised Code §2115.04 provides that not less than five days previous thereto, a written notice stating the time and place of making the inventory required by §2115.02 of the Revised Code must be served by the executor or administrator on the surviving spouse, but such notice may be waived in writing by such surviving spouse.

36. Ohio Revised Code §2119.01 provides that when a person owning property in this state has disappeared and has not been heard from, after diligent inquiry and for at least three months, under circumstances that afford reasonable ground to believe that the person is dead, cannot return or refuses to return to

the person's home, and the person's estate requires attention, supervision, and care, or is needed for the maintenance of the person's dependents, the probate court, on application of the spouse or one of the next of kin, may appoint a trustee to take possession and charge of the property of the person, other than the property with respect to which the person has made provision by written instrument designating an agent or attorney in fact.

37. Chapter 2125 of the Ohio Revised Code is entitled "Action for Wrongful Death." Ohio Revised Code §2125.02 provides, in part, that a civil action for wrongful death shall be brought in the name of personal representative of the decedent for the exclusive benefit of the surviving spouse, the children and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent. Compensatory damages may be awarded in a civil action for wrongful death that may include damages for the loss of the society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training and education, suffered by the surviving spouse, dependent children, parents or next of kin of the decedent including the mental anguish incurred by said individuals.

V. Federal Income and Estate Taxes

38. On August 29, 2013, the Internal Revenue Service clarified its position by issuing Revenue Ruling 2013-17 which provides that same-sex couples legally married in jurisdictions that recognize their marriages will be treated as married for federal tax purposes, including income, gift and estate taxes. This

means that all federal tax provisions where marriage is a factor (filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA, claiming the earned income tax credit or child tax credit) apply to married same-sex couples. The ruling, effective September 16, 2013, applies regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage or a jurisdiction that does not recognize same-sex marriage. And while any same-sex marriage legally entered into in one of the 50 states, the District of Columbia, a U.S. territory or a foreign country will be covered by the ruling, it does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law.

39. Not all federal government agencies have taken a similar position. The Family and Medical Leave Act (FMLA) is a federal law that entitles eligible employees of covered employers to take unpaid, job-protected leave for specific family and medical reasons, with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The Wage and Hour Division of the U.S. Department of Labor has issued guidance indicating that for purposes of FMLA, a spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including common law marriage and same-sex marriage. Consequently, married same-sex couples residing in Ohio do not qualify for protection under FMLA.

40. Income Taxes. In the most recent United States Government Accountability Report, the federal government identified 1,138 federal statutory provisions

in which marital status was at least a factor in determining the rights and privileges of individuals. Of course, marital status is a key factor in determining how individuals file their federal and state individual income tax returns. When the United States Supreme Court held that Section 3 of the Defense of Marriage Act was unconstitutional, questions immediately arose regarding how the Internal Revenue Service would permit married gay and lesbian couples to file their individual income tax returns.

41. Under *Windsor,* the federal government cannot refuse to acknowledge a valid same-sex marriage.[4] Same-sex couples, then, living in a state that celebrates and recognizes same-sex marriages could proceed somewhat confidently in planning to file federal income tax returns as married, whether jointly or separately. What was unclear from the opinion, however, was whether the federal government must accept as married same-sex couples who were issued a marriage license in a same-sex marriage state but resided in a state that does not recognize out-of-state same-sex marriages and either statutorily or constitutionally prohibits such marriages in their own state. The issuance by the IRS of Revenue Ruling 2013-17 resolved the issue. As such, all federal tax provisions where marriage is a factor (filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA, claiming the earned income tax credit or child tax credit) apply to married same-sex couples, regardless of their state of residency.

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[4] *See United States v. Windsor,* 570 U.S. (2013) (slip opinion) at 20 ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.")

42. While federal income tax filing issues for same-sex married couples are being resolved, state income tax filings for same-sex married couples are confusing. Many states require filers to mirror their federal filing status. For example, under Ohio law, "'Adjusted gross income' or 'Ohio adjusted gross income' means federal adjusted gross income...."[5] Since the Internal Revenue Service has issued guidance that it will consider same-sex couples as married for federal income tax filing purposes, it appears filers who celebrated their marriages in a same-sex marriage state but now reside in a non-same-sex marriage state may need to compute their taxable income as single for state filing purposes.

43. Another confusing factor for same-sex married couples is how to file their Ohio individual income tax returns. Ohio statute provides that if a husband and wife file a joint federal income tax return for a taxable year, they shall file a joint return in Ohio for said taxable year and that the tax liability is joint and several. Since Ohio does not recognize same-sex marriages, it is unclear how married same-sex couples who file their federal income tax returns jointly can comply with Ohio law.

44. Estate Taxes. In 2013, the unified credit and transfer tax exemption amount from federal estate taxes is $5,250,000. This exemption amount determines the value of assets that can pass free of federal estate tax at one's death (if not used during life).

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[5] *See* Ohio Revised Code § 5747.01(A). For comparable statutes in other states that prohibit same-sex marriage see: Indiana Code § 6-3-1-3.5(a); Kentucky Revised Statutes § 14.010(9); Nebraska Revenue Statute § 77-2714.01(a); Virginia Code § 58.1-324(b) and 58.1-341(A)(1).

45. Internal Revenue Code Section 2056 provides for a marital deduction for assets passing to a surviving spouse. Married gay and lesbian couples are now afforded the opportunity to take advantage of the marital deduction for federal estate tax purposes, which previously had not been the case. The availability of the marital deduction can have a significant economic impact, if the couple's combined taxable estates exceed the federal exemption amount.

46. Prior to *Windsor* and Revenue Ruling 2013-17, the inability to utilize the marital deduction could have resulted in a monumental federal estate tax liability at the first spouse's death. As an illustration, if at the first spouse's death his/her taxable estate was $6,250,000 and those assets were bequeathed to the surviving spouse, the federal estate tax liability potentially would have been approximately $400,000 without the benefit of the unlimited marital deduction.

47. Now, not only do same-sex married couples receive equal treatment of the unlimited marital deduction, they also may benefit from other tax laws surrounding the portability of the unused federal estate tax exemption of a deceased spouse. For example, if at the first spouse's death his/her taxable estate for federal estate tax purposes was $3,250,000, the $2,000,000 of unused exemption can now be transferred to the surviving spouse. This would result in the surviving same-sex spouse having an increased federal estate tax exemption of $7,250,000. Again, prior to *Windsor* and Revenue Ruling 2013-17, this tax benefit would not have been available to married same-sex couples.

48. Historically, another trap for the gay or lesbian married couple was the taxation of jointly owned property. Jointly owned property is taxed quite

differently depending on whether the joint owners are married. The general rule in Internal Revenue Code Section 2040 provides that the entire value of jointly owned property where the joint owners are not married is included in the gross estate of the first owner to die, except to the extent that the survivor can show that he or she contributed consideration toward the acquisition of the property. Conversely, if the joint owners are married, the general rule is that only one-half of the value of the jointly held property is included in the gross estate of the first owner to die regardless of who supplied the consideration. As a result, if the jointly owned property between a married heterosexual couple is held as "joint tenants with rights of survivorship," the one half interest in the property included in the decedent's estate will receive the benefit of the marital deduction and pass to the surviving spouse free of federal estate tax. Prior to *Windsor* and Revenue Ruling 2013-17, for gay and lesbian married couples, to prevent the inclusion of the entire value of jointly owned property in the taxable estate of the first spouse to die (for which no marital deduction was available), they were required to document how much consideration each party contributed toward the acquisition of the property for future use in determining the extent such property would be taxed at the death of the first spouse to die.

49. Note the aforementioned paragraphs relate only to the federal estate tax system. If the married same-sex couple lives in a state that does not recognize their marital relationship, such as the Commonwealth of Kentucky, a significant estate or inheritance tax can be assessed regardless of the marital deduction being available at the federal level. Prior to the repeal of the state estate tax statutes for individuals who died on or

after January 1, 2013, the same was true for married same-sex couples living in the State of Ohio.

VI. Estate Planning Considerations

50. Ohio law provides many protections and safeguards to a surviving spouse at the death of his/her spouse. In light of Ohio's non-recognition of valid same-sex marriages granted in other jurisdictions, individuals in same-sex marriages must take into consideration when preparing their estate plan the issues hereinafter reviewed.

51. Wills. The drafting of any last will and testament must be done with the utmost care. Nominating an executor or personal representative is an important task. Without a last will and testament, a probate court will appoint a legal representative for the estate, who typically is a person defined under Ohio law as next-of-kin of the decedent. In Ohio, the surviving spouse in a same-sex marriage is excluded from the definition of next-of-kin.

52. A decedent's next-of-kin also are entitled to notice of the probate of the decedent's will. In Ohio, since the surviving spouse in a same-sex marriage is not considered next-of-kin, it is likely that the decedent's parents or siblings would be entitled to the notice and not the same-sex spouse.

53. Also under Ohio law, a decedent's next-of-kin have standing to contest the decedent's will, which can cause a tremendous amount of anxiety to a gay or lesbian married individual who fears that his/her family members may contest the validity of his/her last will and testament that benefits the same-sex surviving spouse.

54. It is important for married same-sex couples to keep in mind that a last will and testament, like most of the estate planning instruments referenced herein, may not be automatically revoked if the same-sex couple terminates their relationship, as is typically the case in a divorce of a heterosexual marriage.

55. These are just a few of the issues confronting married same-sex couples when contemplating the preparation of a last will and testament.

56. Trusts. A living trust (commonly referred to as "revocable trust agreement" or "*inter vivos* trust") can be funded during one's life. If so, the trust-owned assets can easily be managed for the grantor's benefit in the event of incapacitation and said assets should avoid the probate administration process at such person's death, which can be an attractive alternative to the married same-sex couple for the aforementioned reasons. Instead of being governed by the provisions of a last will and testament, the trust assets would be administered by the trustee in accordance with the terms of the trust agreement. While the trustee can avail himself/herself of the jurisdiction of the probate court if need be, typically a living trust allows the trustee to manage and dispose of the trust assets without court intervention.

57. Obviously, choosing a trustee to serve at the trust creator's death or incapacitation is of utmost importance. In addition, the creator of the trust can establish certain trusts to be created at his or her death. For example, directing that the trustee continue to hold the trust assets for the benefit of the surviving same-sex spouse so that the assets can be made available for the benefit of the surviving spouse, but not subject said assets to estate taxation at the surviving spouse's later death. Another option to

consider is drafting the trust for the benefit of a same-sex spouse in a manner that allows the trust to qualify for the marital deduction. This was a particularly important drafting approach during the period prior to *Windsor* and Revenue Ruling 2013-17, since it was not clear when, or if, the marital deduction would be made available to married same-sex couples for federal estate tax purposes. This still could be an issue, however, for married same-sex couples who are domiciled in a state that does not recognize their marriage for state estate and inheritance tax purposes.

58. Durable Financial Powers of Attorney. While not necessary at times for married heterosexual couples, same-sex married couples should execute durable financial powers of attorney. These documents allow for another individual (commonly referred to as an "attorney-in-fact") to act on one's behalf should he or she become incapacitated. A properly drafted durable financial power of attorney can authorize the spouse to access bank accounts to pay the incapacitated spouse's bills, mortgage payments, etc., and to allow the attorney-in-fact to manage the incapacitated spouse's financial affairs. Provisions may also be included to specifically authorize the attorney-in-fact to make gifts of the principal's property to the principal's spouse and/or other family members for tax planning purposes.

59. If one becomes incapacitated and unable to manage his or her financial affairs and does not have a valid durable financial power of attorney in place, a guardianship court proceeding may be instituted whereby a judge would appoint an individual to serve as legal guardian for the incapacitated individual. Ohio Revised Code §2111.04 provides that no guardian

shall be appointed until at least seven days after the probate court has caused written notice, setting first the time and place of the hearing, upon the next-of-kin of the person for whom appointment is sought. Because same-sex marriage is not recognized in Ohio, an alleged incompetent's same-sex spouse would not be entitled to notice of the proceeding since she/he would not be considered next-of-kin. Such a circumstance could be devastating to gay and lesbian couples, if a court refuses to appoint the same-sex spouse as guardian and instead appoints an individual who is next-of-kin and who may not look lovingly upon the homosexual relationship.

60. Medical Directives. With respect to healthcare matters, same-sex married couples must execute healthcare proxies (commonly referred to as "durable powers of attorney for healthcare" or "medical directives") which authorize another individual to make medical decisions for an individual when he or she is unable to do so. Such authorizations are typically very broad and allow another person to make all types of medical decisions on behalf of the incapacitated person, such as consenting to surgery, authorizing transportation to another healthcare facility, and accessing medical records. Most importantly, however, naming the same-sex spouse as the healthcare surrogate is the way to assure a same-sex spouse that they will not be denied visitation rights or a voice in making decisions concerning their spouse's health care matters, since Ohio law does not recognize the individual as spouse or a family member.

61. Similar to a durable financial power of attorney, should one become incapacitated without executing a healthcare proxy, a court proceeding may be initiated in order for a court to appoint a guardian who would

make medical decisions on behalf of the incapacitated patient. Notice of these court proceedings are typically only given to next-of-kin which, under Ohio law, would not include a same-sex spouse. Again, in this instance, a court would determine who it feels is best suited to make such decisions on the incapacitated person's behalf—who may or may not be the same-sex spouse.

62. A living will directive or living will declaration is a document expressing an individual's desires concerning how he or she wishes to be treated from a medical perspective in certain circumstances. Typically a living will directive or declaration is only operative if the patient is in a terminal condition, a permanently unconscious state, or some other seriously grave condition. Such a directive or declaration sets forth a person's desire to discontinue healthcare treatment in certain circumstances, including the administration of artificially supplied nutrition and hydration, and allow the patient to die naturally. Same-sex married couples typically execute both a healthcare proxy and a living will directive and deliver a photocopy of these documents to their healthcare providers. Also, same-sex married couples are advised to have a candid discussion with their medical providers to make certain their physicians and other medical providers are aware of the nature of the same-sex marital relationship.

63. Disposition of Remains. Upon death, Ohio statute provides that a deceased person's surviving spouse shall have priority over all others and have the right of disposition of the deceased person's remains, unless the deceased person executed a written declaration prior to death.

64. Whereas a widowed person in an opposite sex marriage would routinely be permitted to dispose of

their spouse's remains when they die as a matter of law, same-sex married people in Ohio do not have such a right unless the deceased person completed a document typically captioned "Appointment of Representative for Disposition of Bodily Remains, Funeral Arrangements, and Burial or Cremation Goods and Services" prior to death. If said document is prepared in conformity with Ohio law and appoints the same-sex spouse as the representative, said same-sex surviving spouse would then have the legal authority to dispose of their deceased spouse's remains.

65. Domestic Partnership Agreements. While laws of every state grant various rights and privileges to heterosexual married couples in the event the relationship terminates by divorce or dissolution, Ohio does not provide such protections to same-sex married couples. In Ohio, to my knowledge no court to date has accepted jurisdiction to hear a petition for dissolution or a complaint for divorce brought by a same-sex married couple now living in Ohio. Therefore same-sex married couples must draft additional documents to address what will happen in the event the parties wish to terminate their relationship. Domestic partnership agreements are a vehicle where a same-sex married couple can establish certain legally enforceable rights between each other. Such an agreement can set forth the financial responsibilities of each partner and describe with particularity the rights of each party to the couple's property, especially if such property is jointly owned. A domestic partnership agreement typically outlines the division of property in the event the relationship terminates by any means other than death.

66. Employee Benefits. Certain large employers, even those operating in states that prohibit same-sex

marriage, are adding the full range of benefits for gay and lesbian employees and their significant others.[6] Many private employers, however, continue to limit their employment benefits to the spouse and dependants of a heterosexual married employee, sometimes relying on state law refusals to recognize same-sex marriages.

67. While most assets can be transferred to a living trust in order to avoid probate administration at death, certain assets are not eligible to be owned by a trust. For instance, the owner of an IRA account cannot transfer title of the account to his or her living trust. However, the IRA owner can avoid probate administration of the IRA account proceeds remaining at the owner's death by completing a beneficiary designation form. Obviously, if the retirement account owner is considered married, his or her same-sex spouse would have greater rights to the account and more flexibility in regard to the options concerning the distribution of the funds (for income tax planning purposes). Designating a trust as the primary beneficiary of retirement accounts could result in such assets being distributed over a shorter time period than otherwise might be available if such retirement

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[6] According to the Human Rights Campaign's 2013 Corporate Equality Index, approximately 62% of all Fortune 500 companies offer domestic partner health benefits. *See* Human Rights Campaign Foundation, Corporate Equality Index 2013, p. 9. Available at: http://www.hrc.org/corporate-equality-index/. Additionally, in January 2013, prior to the Supreme Court's ruling in *Windsor,* aerospace giant Boeing agreed to offer survivor pension benefits to the spouses of deceased employees. *See also* Trudy Ring, "Boeing Reverses Course, Will Offer Gay Spouses Survivor Benefits" (Jan. 18, 2013, 3:30 PM), http://www.advocate.com/business/2013/01/18/boeing-reverses-course-will-offer-gay-spouses-survivor-benefits.

account assets were payable directly to a same-sex spouse.

VII. Conclusion

68. Admittedly, estate planning and probate challenges for married same-sex couples have been alleviated somewhat in light of *Windsor* and Revenue Ruling 2013-17, but many obstacles still remain for married same-sex couples living in states that do not recognize their marital relationship. While certain estate planning instruments (such as wills, trusts and powers of attorney) are typically advantageous for married same-sex couples to implement, those documents alone do not provide the full array of benefits and protections afforded to traditional married heterosexual couples. Until said laws are applied equally to all married couples, married same-sex couples living in Ohio will need to continue exploring various legal alternatives in which to protect their families and wealth.

Signed under the penalty of perjury under the laws of the State of Ohio this 11th day of October, 2013.

/s/ Bernard L. McKay
Bernard L. McKay

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 10/11/13]

Case No. 1:13-cv-00501

JAMES OBERGEFELL, ET AL.,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, ET AL,

Defendants.

Judge Timothy S. Black

EXPERT DECLARATION OF LETITIA ANNE PEPLAU, PH.D. IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

I, Letitia Anne Peplau, Ph.D., pursuant to 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following are my true and correct opinions:

PRELIMINARY STATEMENT

1. My professional background, experience, and publications are detailed in my curriculum vitae, a true and accurate copy which is attached as Exhibit A to this declaration. I have been retained by counsel for Plaintiffs as an expert in connection with the above-

captioned litigation ("Obergefell"). I have actual knowledge of the matters stated in this declaration and could and would so testify if called as a witness.

2. I was a Professor of Psychology at the University of California, Los Angeles beginning in 1973, with promotions to tenure in 1978, to full professor in 1982, and to Distinguished Professor in 2010. From 2005-2011, I served as Director of the UCLA Interdisciplinary Relationship Science Program. This program, funded by the National Science Foundation, trained doctoral students in the study of families and other personal relationships. I formally retired from UCLA in June 2011, but am continuing to work at UCLA as Distinguished Research Professor and as the Psychology Department Vice Chair for Graduate Studies.

3. In broad terms, my research addresses topics concerning personal relationships, gender, and sexual orientation. I have conducted research on heterosexual couples, co-authored a book entitled Close Relationships, and published articles comparing empirical findings about men's and women's experiences in close relationships. In the 1970s, I was one of the first researchers to conduct empirical investigations of the intimate relationships of lesbians and gay men, and I have continued this program of research for the past 35 years. In addition, I have written several major reviews of the scientific research on same-sex relationships, including a 2007 article in the Annual Review of Psychology and a 2009 article in the Encyclopedia of Human Relationships. I have also conducted empirical studies on gay and lesbian identity.

4. I received my B.A. in Honors Psychology from Brown University in 1968 and my Ph.D. in Social

Psychology from Harvard University in 1973. As reflected in my curriculum vitae (Exhibit A), I have published more than 120 papers in scholarly journals and scholarly books, primarily in the field of couple relationships. I have co-authored or co-edited over 10 books, and I have frequently presented my research at universities and scientific meetings.

5. My expertise extends beyond the specific areas addressed in my own empirical research program to include other theory and empirical research related to sexual orientation and same-sex relationships. A broad knowledge of this area has been necessary not only for my own scholarship, but also for successfully completing my professional duties as a teacher, as Director of the UCLA Interdisciplinary Relationship Science Program, and as a reviewer of academic journals and book manuscripts.

6. As a result of my research and other accomplishments, I have received several professional awards. I have been elected a fellow of the American Psychological Association and of the Association for Psychological Science. I have received lifetime achievement awards from the American Psychological Association, the International Association for Relationship Research, and the Society for the Scientific Study of Sexuality. I also had the honor of being elected president of the International Society for the Study of Personal Relationships (an organization since renamed the International Association for Relationship Research).

7. In preparing this report, I reviewed the materials listed in the attached Bibliography (Exhibit B). I may rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this report, as additional support

for my opinions. For the documents from websites that I have cited, I have listed the true and complete web address and the date I last accessed those documents in my report. I have also relied on my years of experience in this field, as set out in my curriculum vitae (Exhibit A), and on the materials listed therein. The materials I have relied upon in preparing this report are the same types of materials that experts in my field of study regularly rely upon when forming opinions on the subject.

8. In the past four years, I have testified as an expert—either at trial or through declaration—or been deposed as an expert in *In the Matter of the Adoption of XXG. and N.R.G.* in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, Florida, Case No. 06-43881 FC 04, *Cole v. The Arkansas Department of Human Services* in the Circuit Court of Pulaski County, Arkansas, Case No. CV2008-14284, *Perry v. Schwarzenegger,* 704 F. Supp.2d 921 (N.D. Cal. 2010), *Golinski v. Office of Personnel Management,* 824 F.Supp.2d 968 (N.D. Cal. 2012), *Windsor v. US.,* 833 F. Supp.2d 394 (S.D.N.Y. 2011), *Pedersen v. Office of Personnel Management,* 881 F. Supp. 2d 294, 2012 WL 3113883 (D. Conn. 2012), *Dragovich v. US. Dep't of the Treasury,* 872 F. Supp. 2d 944, 2012 WL 1909603 (N.D. Cal. 2012), *Donaldson and Guggenheim v. Montana* in the Montana First Judicial District Court, Lewis and Clark County, Case No. BDV-2010-702, *Sevcik v. Sandoval,* No. 2:12-CV-00578-RCJ-PAL (D. Nev. 2012), and *Darby v. Orr, Lazaro v. Orr,* Nos. 12 CH 19718 & 19719 (Circuit Ct., Cook Cty).

9. I am being compensated an hourly rate for actual time devoted, at the rate of $300.00 per hour for

preparation of reports and for testimony. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

SUMMARY OF OPINIONS

10. Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. Most adults are attracted to and form relationships with members of only one sex. Efforts to change a person's sexual orientation through religious or psychotherapy interventions have not been shown to be effective.

11. It is well-established that homosexuality is a normal expression of human sexuality. It is not a mental illness, and being gay or lesbian has no inherent association with a person's ability to lead a happy, healthy, and productive life or to contribute to society.

12. Research shows that same-sex couples closely resemble heterosexual couples. Like their heterosexual counterparts, many lesbian, gay, and bisexual individuals form loving, long lasting relationships with a partner.

13. Marriage provides a range of social and other benefits and protections to spouses. These contribute to enhanced psychological well-being, physical health, and longevity among married individuals. Same-sex couples are therefore harmed by being excluded from marriage.

14. In the United States, lesbian, gay, and bisexual individuals experience pervasive social stigma and the added stress that results from prejudice and discrimination. Stigma is reflected both in acts of

individuals and in the institutions of society, including its laws, that legitimate and perpetuate the second-class status of gay men, lesbians, and bisexuals. By denying recognition to legally married same-sex couples, Ohio Revised Code Sections 3101.01 and 3101.05 and the 2004 amendment to the Ohio Constitution (Article XV, §11), both reflect and perpetuate stigma against lesbians, gay men, and same-sex couples. The stigma and discrimination perpetuated by these statutory and constitutional amendments harms not only same-sex couples, but gay men, lesbians, and bisexuals as a group.

15. There is no scientific support for the notion that allowing same-sex couples to marry would harm different-sex relationships or marriages. The factors that affect the quality, stability, and longevity of different-sex relationships would not be affected by marriages of same-sex couples.

OPINIONS

I. Understanding Sexual Orientation

A. What Is Sexual Orientation?

16. The American Psychological Association provides a widely accepted definition of sexual orientation: "Sexual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes. Sexual orientation also refers to a person's sense of identity based on those attractions, related behaviors, and membership in a community of others who share those attractions."[1]

17. Beginning with the research of Alfred Kinsey in the 1940s, researchers have recognized that sexual

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[1] American Psychological Association, 2008; Herek, 2000.

orientation can range along a continuum from exclusively heterosexual to exclusively homosexual. Nonetheless, it is most often discussed in terms of three categories: heterosexual (having emotional, romantic, or sexual attractions to members of the other sex), gay/lesbian (having attractions to members of one's own sex), and bisexual (having attractions to both men and women). Most adults in the United States can readily categorize themselves as heterosexual, gay/lesbian, or bisexual.[2] The specific category name that an individual prefers (e.g., homosexual, gay) may vary,[3] but in national surveys in the U.S., nearly all participants are able to indicate their sexual orientation category.

18. For clarity, it is important to distinguish sexual orientation from other aspects of sex and gender. These include biological sex (the anatomical, physiological, and genetic characteristics associated with being male or female), gender identity (an individual's psychological sense of being male or female), and gender-role orientation (the extent to which an individual conforms to cultural norms defining feminine and masculine behavior).

19. Social scientists view sexual orientation as a multi-faceted phenomenon involving attractions, related behaviors, and identity. In research studies, the particular component of sexual orientation that researchers assess will differ depending on the purpose of the research. For example, a study about the experiences of individuals in same-sex marriages would recruit participants based on their behavior of

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[2] See, e.g., Chandra, Mosher, Copen & Sionean, 2011, pp 29-30; Laumann, Gagnon, Michael & Michaels, 1994, p. 293.

[3] See, e.g., Herek, Norton, Allen & Sims, 2010.

marrying a person of the same sex. A study of personal experiences of social stigma and discrimination among openly gay and lesbian individuals would most likely recruit individuals who self-identify as gay or lesbian.

20. Sexual orientation is inherently linked to social relationships. Sexual orientation is a characteristic of an individual, like his or her biological sex, age, or race, and it is also about relationships—whether an individual is attracted sexually or romantically to partners of the same sex or different sex.[4] Just as heterosexual individuals often express their sexual orientation through relationships including marriage with a different-sex partner, so gay and lesbian individuals express their sexual orientation through relationships including marriage (where possible) with a same-sex partner. Further, sexual orientation is not merely about sexual behavior but also about building enduring intimate relationships. In other words, sexual orientation is centrally linked to the most important personal relationships that adults form with other adults in order to meet their basic human needs for love, attachment, and intimacy. These relationships, whether with a same-sex or different-sex partner, are an essential part of an individual's personal identity.

B. Can Sexual Orientation Be Changed?

21. Currently, the precise factors that cause an individual to be heterosexual, homosexual, or bisexual are still being researched. Much research has examined possible genetic, prenatal hormonal, developmental, and social influences on sexual orientation, and

[4] Peplau & Cochran, 1990; Peplau & Fingerhut, 2007.

many scientists view sexual orientation as resulting from the interplay of those factors.[5]

22. A consistent finding across many studies, beginning with the work of Alfred Kinsey in the 1940s and 1950s and continuing through current research, is that most adults report having sexual attractions to and experiences with members of only one sex.[6] As adults, the majority of these individuals have had exclusively heterosexual experiences and attraction, and a minority have had exclusively same-sex experiences and attraction. A small percentage of adults report sexual attractions and experiences with both sexes.[7]

23. The significant majority of adults exhibit a consistent and enduring sexual orientation.[8] The fact that many lesbian and gay adults form long-term intimate relationships with a partner of the same sex,[9] just as heterosexual adults do with a partner of the other sex, provides evidence of the stability of sexual

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[5] American Psychological Association, 2008.

[6] Kinsey, Pomeroy & Martin, 1948; Kinsey, Pomeroy, Martin & Gebhard, 1953; Laumann, et al., 1994; Chandra, et al., 2011.

[7] Some individuals are very clear about their sexual orientation at an early age. In contrast, because of the social prejudice and discrimination against gay men and lesbians, some adolescents and young adults go through a prolonged period of trying to understand their own sexual identity and coming to terms with being lesbian, gay, or bisexual.

[8] Based on large-scale survey data, Chandra et al. (2011, p. 1) conclude that "Sexual attraction and identity correlate closely but not completely with reports of sexual behavior." Thus, most heterosexual individuals do not engage in sexual activity with same-sex partners, and most gay and lesbian individuals similarly do not engage in heterosexual behavior.

[9] Carpenter & Gates, 2008; see also Peplau & Fingerhut, 2007.

orientation over time. Nonetheless, a small minority of individuals are exceptions to this majority pattern. For example, while in prison, some men who identify as heterosexual may nonetheless engage in sexual activities with men since female partners are unavailable. Some individuals have reported changes in their sexual orientation in midlife, perhaps as a result of meeting a particular person. Understanding these kinds of exceptions to the general pattern of stable sexual orientation described above is of theoretical interest to scholars. Researchers have used terms like "sexual fluidity" or "sexual plasticity" to refer to changes in sexual behavior, attractions, and identity over time or across situations. Importantly, observations about fluidity in a small minority of people should not obscure the big picture of stability for the majority of adults. In a discussion of women's sexual fluidity, Peplau and Garnets[10] noted: "Claims about the potential erotic plasticity of women do not mean that most women will actually exhibit change over time. At a young age, many women adopt patterns of heterosexuality that are stable across their lifetime. Some women adopt enduring patterns of same-sex attractions and relationships." Nor does the fact that a small minority of people may experience some change in their sexual orientation over their lifetime suggest that such change is within their power to effect, let alone that individuals outside this small minority have the power to change voluntarily their sexual orientation. This is why standard definitions of sexual orientation characterize it as stable.

24. Before the emergence of gay communities in the United States, it was fairly common for lesbians and

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[10] Peplau & Garnets, 2000, p. 333.

gay men to marry a person of the other sex.[11] They entered these ostensibly "heterosexual" marriages for diverse reasons: to avoid social stigma, in response to pressure from family and friends, from a belief that marriage was the only way to have children, and/or to participate in a fundamental social institution. In some cases, these individuals only recognized or acknowledged their sexual orientation after marriage. It is psychologically harmful to ask lesbians and gay men to deny a core part of who they are by ignoring their attraction to same-sex partners and instead marrying a different-sex partner. Moreover, the disclosure that a spouse is gay or lesbian is often hurtful to the heterosexual spouse, highly upsetting to their children or other family members, and frequently sets the stage for separation or divorce. Therefore, encouraging gay men and lesbians to enter into a marriage with a heterosexual partner is not in the best interests of the individuals or the interests of society.

25. When gay men and lesbians are asked by researchers about their sexual orientation, the vast majority report that they experienced no choice or very little choice about their sexual orientation. In a national survey conducted with a representative sample of more than 650 self-identified lesbian, gay, and bisexual adults, 95% of the gay men and 83% of the lesbians reported that they experienced "no choice

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[11] Bozett, 1982; Higgins, 2006. Researchers have estimated the percentage of lesbians and gay men who have been married. An analysis of responses to a 2003 survey of adults in California found that about 25% of lesbians and 9% of gay men ages 18-59 reported having ever been married, most of them presumably to a person of the other sex (Carpenter & Gates, 2008, Table 3).

at all" or "very little choice" about their sexual orientation.[12]

26. Sexual orientation is highly resistant to change through psychological or religious interventions. In 2007, the American Psychological Association appointed a task force to conduct a systematic review of the peer-reviewed journal literature on sexual orientation change efforts.[13] The Task Force concluded that "efforts to change sexual orientation are unlikely to be successful and involve some risk of harm" (p. 3). Based on currently available research, there is no credible evidence that these efforts are either effective or safe, and ample reason to believe that these interventions can harm those who participate.[14] The

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[12] Herek, Norton, Allen & Sims, 2010. In that survey, 88% of gay men reported that they had "no choice," and 7% reported "very little choice." Similarly, 68% of lesbians responded that they had "no choice at all," and 15% reported having "very little choice." See also results from a California survey by Herek, Gillis & Cogan, 2009, Table 5.

[13] APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation, 2009, *Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation*. Washington, DC: American Psychological Association. This report provides a detailed review and analysis of relevant research. Available at: http://www.apa.org/pi/lgbt/resources/ therapeutic-response.pdf.

[14] Although some psychotherapists and religious counselors have reported changing their clients' sexual orientation from homosexual to heterosexual, empirical support for these claims is lacking. After reviewing published empirical research on this topic, the APA Task Force reported that it found "serious methodological problems in this area of research, such that only a few studies met the minimal standards for evaluating whether psychological treatments, such as efforts to change sexual orientation, are effective" (p. 2). Based on its review of the studies that met acceptable standards, the Task Force concluded that "enduring change to an individual's sexual orientation is uncommon. The participants in this body of research

Task Force also found evidence that many individuals who unsuccessfully attempt to change their sexual orientation experience considerable psychological distress including anxiety, depression, thoughts of suicide, and sexual dysfunction.

27. Currently, no major mental health professional organization has approved interventions to change sexual orientation, and virtually all of them have adopted policy statements cautioning professionals and the public about these treatments.[15] These include the American Psychiatric Association, American Psychological Association, American Counseling Association, and National Association of Social Workers. Further, since adolescents may be subjected to these treatments after disclosing to their families that they are gay, lesbian, or bisexual, the American Academy of Pediatrics has adopted a policy statement advising that therapy directed specifically at attempting to change an adolescent's sexual orientation should be

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continued to experience same-sex attractions following SOCE [sexual orientation change efforts] and did not report significant change to other-sex attractions that could be empirically validated, though some showed lessened physiological arousal to all sexual stimuli. Compelling evidence of decreased same-sex sexual behavior and of engagement in sexual behavior with the other sex was rare. Few studies provided strong evidence that any changes produced in laboratory conditions translated to daily life. Thus, the results of scientifically valid research indicate that it is unlikely that individuals will be able to reduce same-sex attractions or increase other-sex sexual attractions through SOCE" (pp. 2-3).

[15] These policy statements are compiled in *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel*, a publication that is available from the Just the Facts Coalition on the American Psychological Association's website: http://www.apa.org/pingbt/resources/just-the-facts.pdf.

avoided and is unlikely to result in change. The Pan American Health Organization, which is the World Health Organization's regional office for the Americas and the oldest public health organization in the world, has stated that "there is no scientific evidence for the effectiveness" of efforts to change sexual orientation.[16]

28. In summary, there is convergent scientific evidence documenting that sexual orientation reflects an enduring set of attractions and experiences for most people. Efforts to change a person's sexual orientation through religious or psychotherapy interventions have not been shown to be effective.

II. Sexual Orientation Does Not Affect a Person's Ability to Function Effectively

29. The consensus view of scientific researchers and mental health professionals is that homosexuality is a normal expression of human sexuality. Homosexuality is not a mental illness, and being gay or lesbian has no inherent association with a person's ability to participate in or contribute to society.[17] Lesbians and gay men are as capable as heterosexuals of leading a happy, healthy, and productive life. They are also as capable as heterosexuals of doing well in their jobs and of excelling in school.

30. Although homosexuality was once believed to be a mental illness, that mistaken view was discredited by scientific research beginning in the 1970s. In 1973, the American Psychiatric Association removed homosexuality from its Diagnostic and Statistical Manual of Mental Disorders, noting that "homosexuality per se

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[16] Pan American Health Organization, 2012.

[17] Herek, 2010; Herek & Garnets, 2007.

implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[18] In 1975, the American Psychological Association endorsed this position and urged psychologists to help educate the public and to dispel the stigma of mental illness associated with homosexuality.[19]

31. Gay and lesbian individuals are subject to the same stresses of life as their heterosexual counterparts, including the death of a close relative, loss of a job, or a serious illness. Research consistently demonstrates that high levels of stress are harmful not only to psychological well-being but also to physical health.[20] In addition to the life stresses that can affect everyone, members of stigmatized minority groups, including gay men and lesbians as well as ethnic/racial minorities, may experience additional stress caused by prejudice and discrimination. This has been termed "minority stress."[21] This excess stress has been associated with an increased risk of psychological problems, especially those like anxiety and depression that are most closely linked to stress.[22] Despite the pervasive social stigma against homosexuality and the resulting unique social stressors lesbians and gay men experience, the vast majority of lesbian and gay individuals cope successfully with

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[18] American Psychiatric Association, 1974. For other resolutions by this organization, see http://www.healthy minds.org/More-Info-For/GayLesbianBisexuals.aspx.

[19] Conger, 1975. Also, the American Psychological Association has endorsed several resolutions concerning sexual orientation. These can be found at: http://www.apa.org/pi/lgbt/resources/policy/index.aspx (last accessed February 7, 2013)

[20] Thoits, 2010.

[21] Meyer, 2003, 2007.

[22] Herek & Garnets, 2007; Pascoe & Richman, 2009.

these challenges and lead healthy, happy, well-adjusted lives. And there is nothing about sexual orientation itself—whether one is heterosexual or homosexual—that makes a person more or less able to contribute to or participate in society.

32. Social relationships can play an important role in buffering individuals from the stresses of life. Like heterosexuals, lesbians and gay men benefit from having a close intimate relationship, for example, with a spouse or partner. Further, people benefit from the social, emotional, and material support that can be provided by family, friends, and others. Research also documents that the psychological well-being of lesbians and gay men is enhanced by having positive feelings about being gay, having developed a positive sense of gay identity, and being open about their sexual orientation with important other people, such as family members.[23]

III. Scientific Research Into Same-Sex Couples' Relationships Establishes That They Closely Resemble Different-Sex Couples' Relationships

33. Negative stereotypes about same-sex couples are common in America, leading many people to believe and argue that same-sex relationships are fundamentally different from, and inferior to, heterosexual relationships. But the consensus of the scientific research is that this characterization is inaccurate.

34. Lesbians and gay men are as able to form loving, committed relationships with a same-sex

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[23] Herek & Garnets, 2007; Meyer, 2003; Pachankis, 2007; Pascoe & Richman, 2009.

partner as are heterosexuals in committed relationships with a different-sex partner. Empirical research has repeatedly shown that gay men and lesbians have happy, satisfying relationships.[24] Like their heterosexual counterparts, lesbians and gay men form deep emotional bonds and strong commitments to their partners. Research documents striking similarities between same-sex and heterosexual couples on standardized measures of love, relationship satisfaction, and relationship adjustment. The extensive body of research that examines the quality and functioning of same-sex relationships demonstrates that same-sex couples are not inherently different from heterosexual couples. To the contrary, same-sex couples closely resemble heterosexual couples, and the processes that affect both types of relationships are remarkably similar.[25]

35. Lesbians and gay men, like heterosexuals, value committed relationships and a majority would like to marry. In a national survey,[26] 74% of lesbians and gay men said that if they could legally marry someone of the same sex, they would like to do so.

36. Scientific research consistently shows that the same factors that contribute to commitment and stability in different-sex couples apply to same-sex couples. One factor is the quality of a couple's relationship as reflected in factors as satisfaction, love and relationship adjustment. As noted above, research shows that, on average, same-sex and different-sex relationships are equally satisfying and well-adjusted. Couples with more satisfying relationships are more

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[24] Kurdek, 2004, 2005; Peplau & Fingerhut, 2007.

[25] American Psychological Association, 2004.

[26] Kaiser Family Foundation, 2001.

likely to stay together than other couples, regardless of sexual orientation. A second factor that contributes to commitment and stability within different-sex and same-sex couples alike are barriers that make it difficult for a person to leave a relationship. Couples who decide to own joint property, make personal sacrifices for the sake of the relationship, or choose to begin a family through birth or adoption create important barriers to ending the relationship. The more a couple has invested in a relationship in terms of time, energy and resources, the more they stand to lose if the relationship ends. Research demonstrates that, as with their heterosexual counterparts, lesbians and gay men who perceive more barriers to terminating a relationship are more likely to remain together. In addition, certain demographic characteristics of different-sex couples are consistently correlated with breakup rates (e.g. their age at marriage, race, level of education, and religious affiliation). It is likely that the same demographic characteristics that predict stability and instability in different-sex couples also apply to same-sex couples.

37. In 2004, based on a review of research on marriage and same-sex relationships, the American Psychological Association passed a Resolution on Sexual Orientation and Marriage,[27] in which it concluded that "many lesbians and gay men have formed durable relationships" and "the factors that predict relationship satisfaction, relationship commitment, and relationship stability are remarkably similar for both same-sex cohabiting couples and heterosexual married couples." here is widespread consensus among social science researchers that

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[27] American Psychological Association, 2004.

marriage generally provides many benefits to both spouses. A large body of scientific research comparing heterosexuals who are currently married to those who are not married establishes that marriage fosters psychological well-being, physical health, and longevity.[28] Of course, marriages that are unhappy, conflict-ridden, or violent do not provide the same benefits as the average marriage.

IV. Barring Same-Sex Couples from Marriage Causes Them Harm

38. Studies consistently associate marriage with better health and greater longevity; marriage also has a moderating effect on individual risk-taking behavior.[29] Illustrative data come from a report by the U.S. Center for Disease Contro1.[30] Using a large national database, CDC researchers found that regardless of age, sex, race, ethnicity, education, or income, married adults were on average healthier than cohabiting, divorced, widowed, or never married adults. Married individuals reported lower rates of smoking, drinking heavily, or being physically inactive (although married men were more likely to be overweight than other men). Married adults also reported lower rates of being limited in their daily activities of living, being in poor health, or suffering from headaches or serious psychological distress.

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[28] E.g., Cherlin, 2009; Johnson, et al., 2000; Kim & McKenry, 2002; Lamb, Lee,& DeMaris, 2003; Nock, 1995; Proulx, et al., 2007; Schoenborn, 2004; Umberson, 1992; Waite, 1995.

[29] Hu & Goldman, 1990; Johnson et al., 2000; Waite, 1995; Waldron, Hughes, & Brook, 1996.

[30] Schoenborn, 2004. Marital status and health: United States, 1999-2002. *Advance Data from Vital and Health Statistics, Number* 351, December 15, 2004. Centers for Disease Control and Prevention, U.S. Department of Health and Human Services.

Other research using national data reliably demonstrates that, on average, married individuals live longer than unmarried individuals.

39. Marriage is also associated with enhanced psychological well-being. On average, married individuals report less anxiety and depression and greater happiness and satisfaction with life than do unmarried individuals.[31] The legal status of marriage enables spouses to exert greater control over their lives when stressful situations arise and to avoid some types of stressors entirely. In Ohio, these can include, for example, the right to consent to after-death examinations of one's spouse, the right to claim marital communications privilege or spousal immunity from testifying in court, and the right to pursue a divorce, legal separation, or dissolution of marriage.[32]

41. There are two explanations for the clear differences observed between married and unmarried individuals.[33] One explanation is known as the selection effect: to some extent, individuals with better mental and physical health are more likely to choose to marry and/or better able to attract a partner and maintain a relationship over time. Using a variety of research methods, researchers have demonstrated that the selection effect only partially accounts for the

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[31] Kim & McKenry, 2002; Lamb, Lee, & DeMaris, 2003; Proulx, et al., 2007; Waite, 1995.

[32] Ohio Rev. Code Ann. § 2108.50 and § 2108.81 (B)(1); Ohio Rev. Code Ann. § 2317.02

(D) and Ohio Evid. R. 601; Ohio Rev. Code Ann. § 3105.01, § 3105.17, § 3105.61.

[33] Gove, Hughes, & Style, 1990; Kim & McKenry, 2002; Lamb, Lee, & DeMaris, 2003; Waldron, Hughes, & Brook, 1996.

43. In addition, marriage often entails a moral commitment by spouses to support each other "in sickness and in health." Spouses often help each other to adopt more healthful lifestyles, cope with the stress and uncertainty of life, and recuperate from illness and injury.

44. The security of marriage often enables spouses to adopt a long-term perspective, putting off immediate rewards to build a future life together and encouraging mutual sacrifice. This has been referred to as "enforceable trust."[37]

45. One way that couples express the symbolic significance of their marriage is through a wedding ceremony. Although cultures have differing traditions and individual couples may choose to depart from certain customs and traditions, the celebration of a wedding is a ritual that is important to the couple, their respective families, and the larger community. Wedding ceremonies are typically state-sanctioned public rituals that signify not only the joining together of the spouses, but the creation of new extended families and in-laws with shared interests and mutual obligations. The formation of a marriage transforms biological strangers into kin. Wedding ceremonies usually also involve members of the broader community—friends, co-workers, neighbors—who come together to recognize the new status of the couple and their changed position in their community.

46. Marriage is widely regarded as one of the most important rites of passage for adulthood, and it marks a major transition in a person's life. For many, marriage signifies entry into full adulthood, with expectations that the individual will act in more

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[37] Cherlin, 2009.

mature ways. The sense of being a responsible adult may be one reason why married individuals engage in less risky behavior than their unmarried peers. The marriage relationship itself is associated with certain duties and responsibilities—for example that spouses should care for each other and build a life together.

47. When a couple marries, they may bring with them separate networks of family, friends, and others who can support them in time of need. Marriage often merges these support networks, expanding the circle of valued confidants, help givers, and others who are available to the couple. Marriage typically involves spouses in new sets of social obligations: the new responsibilities of each spouse toward their in-laws are complemented by the obligations of the extended family to support the married couple.

48. Social support is central to the institution of marriage. Compared to unmarried individuals, married adults tend to receive more social support from other people, especially from their parents, and this support contributes to individual well-being. The public aspect of marriage can increase each spouse's sense of security that the relationship will be long-lasting.

49. Although these conclusions are derived from studies of heterosexual couples, it is reasonable to infer that same-sex couples will generally benefit from marriage as do their heterosexual counterparts given the many well-established similarities in the nature and quality of same-sex and heterosexual couples' relationships.[38] And, indeed, this was the finding of a recent study of a representative sample of California adults-- gay people who were legally married had

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[38] Kurdek, 2004, 2005; Peplau & Fingerhut, 2007.

significantly better psychological well-being than their peers who were not in a legally recognized relationship.[39]

50. As it does for many different-sex couples, marriage for many same-sex couples creates bonds between the spouses and a social network of in-laws, friends, and others who can provide emotional support and tangible assistance. As with different-sex couples, marriage binds same-sex couples together in a well-understood and highly valued social union and legal contract.

51. Marriage embodies many cultural values and expectations, often reflected in marriage vows by which spouses pledge to love and care for each other, to be faithful to each other, and to stay together through good times and bad until separated by death. These cultural expectations provide a framework that individuals can draw upon to understand and build a relationship together. These cultural expectations also provide guidelines that relatives and society can draw on.

52. Data from same-sex spouses in Massachusetts offer additional insights on the experience of married lesbian and gay American couples.[40] Most lesbians and gay men reported that marriage had improved their social relationships: 62% said their family was more accepting of their partner and 41% said their family was more accepting of their sexual orientation. In addition, 69% felt more accepted in their community. Most respondents said that their parents reacted positively to their marriage (82%) as did their siblings (91%). Lesbians and gay men were also asked about

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[39] Wight, LeBlanc & Badgett, 2013.

[40] Ramos, Goldberg & Badgett, 2009.

ways that marriage had improved their relationship. A majority (72%) agreed that they felt more committed to their partner. Many reported that they now worry less about legal problems (48%) and nearly a third said that one of the spouses receives health benefits from an employer as a result of marriage. Other benefits mentioned included feeling more accepted by society (38%) and feeling more financially stable (14%). One in four of the same-sex couples surveyed were raising children, and 93% of these respondents agreed that their children were happier or better off as a result of their marriage; 2% disagreed, and 4% were unsure.

53. Leading organizations of mental health professionals recognize the benefits of marriage for same-sex couples and the harm created by denying access to civil marriage to same-sex couples. As one example, in 2005 the American Psychiatric Association, the leading organization representing physicians in the field of mental health, adopted a policy statement on this issue. Their resolution stated: "In the interest of maintaining and promoting mental health, the American Psychiatric Association supports the legal recognition of same-sex civil marriage with all rights, benefits, and responsibilities conferred by civil marriage, and opposes restrictions to those same rights, benefits, and responsibilities."[41] Further, in its Resolution on Sexual Orientation and Marriage,[42] the American Psychological Association resolved "[t]hat APA believes that it is unfair and discriminatory to deny same-sex couples legal access to civil marriage and all its attendant benefits, rights, and privileges."

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[41] American Psychiatric Association, 2005.

[42] American Psychological Association, 2004.

V. Barring Same-Sex Couples from Marriage Reflects and Perpetuates Stigma Against Lesbians, Gay Men, and Same-Sex Couples

54. Lesbian, gay, and bisexual individuals are the targets of prejudice and discrimination in the United States.[43] National opinion surveys document that many Americans have negative attitudes toward this group of people and toward marriage for same-sex couples. Research has also documented that heterosexuals often view same-sex couples more negatively than heterosexual couples.[44] Gay, lesbian, and bisexual individuals experience discrimination at work and in their communities,[45] and most states provide no legal protection against discrimination based on sexual orientation. Significant numbers of gay, lesbian, and bisexual individuals are targets of harassment and violence.[46] These facts demonstrate that gay, lesbian, and bisexual individuals experience pervasive social stigma.

55. Social stigma refers to severe social disapproval of a class of people perceived as being different, deviant, or in violation of cultural norms.[47] In American society today, gay men, lesbians, and bisexuals continue to be a highly stigmatized minority group. Many heterosexuals, who are the dominant group in society, perceive gay men, lesbians, bisexuals, and same-sex couples, as fundamentally different, hold negative stereotypes about their characteristics, and view discrimination against them as acceptable.

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[43] Herek, 2009a.

[44] Testa, Kinder & Ironson, 1987.

[45] Herek, 2009b.

[46] Herek, 2009b.

[47] Herek, 2009a.

physical and psychological differences found between married and unmarried individuals. These research methods include longitudinal studies of the effects of marriage over time, longitudinal studies of transitions into or out of marriage, and studies that statistically control for factors such as income that are known to be associated with health. For example, one longitudinal study found that individuals who married between the first and second assessment were less depressed at the time of the second assessment than those who remained unpartnered. This suggests that getting married on average led to a reduction in depression.[34]

42. The second explanation for the positive physical and psychological benefits of marriage is known as the protection effect.[35] There are many ways in which marriage can provide protective benefits that contribute to the health and well-being of spouses. The marriage relationship is a social union and a legal contract that creates a well-recognized and valued kinship relationship. Marriage binds spouses not only to each other but can also bind individuals to the broader community, which understands, appreciates, and values the significance of the marriage relationship. Marriage often "provides individuals with a sense of obligation to others, which gives life meaning beyond oneself."[36] For many people, marriage has great symbolic significance, establishing that the individual has a new social identity and is part of a valued and respected social institution.

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[34] Lamb, Lee, & DeMaris, 2003.

[35] Cherlin, 2009;Gove, Hughes, & Style, 1984; Kim & McKenry, 2002; Lamb, Lee,& DeMaris, 2003; Waldron, Hughes, & Brook, 1996.

[36] Waite, 1995.

review) play the role of the Madisonian corrective in the pluralist system by protecting disadvantaged minorities from majoritarian excesses and from effective exclusion from the political process.

14. Political power refers to a person's or group's demonstrated ability to extract favorable (or prevent unfavorable) policy outcomes from the political system. In a well-established and commonly cited definition, Robert Dahl wrote that A has power over B when A is able to compel B to do something that B otherwise would not do. Thus, simple meetings of the mind are insufficient to demonstrate the exercise of power. One does not have power over those who, for other reasons, already agree. For example, in the last national election, millions voted for the same candidate I did, but this is not evidence of my electoral influence.

15. Power may also be reflected in the content of the political agenda, the issues that are considered for legislative action. More powerful political actors face fewer legislative threats to their interests than less powerful actors. The very circumstance of being forced to defend interests against potential legislative action is a reflection of weakness rather than strength.

16. Groups that lack political power may, on occasion, receive pledges of support, or even desirable legislative outcomes, that they themselves lack the power to compel through the political process. An elected official may arrive at a position on a policy or proposal for their own reasons unrelated to the specific communicated preferences of the minority group's constituents.

17. In some instances, the minority preferences may be entirely beside the point. For example, an

elected official may choose not to support a bill or policy proposal because he or she may determine that the policy has implications adverse to other interests or because the costs of implementation or enforcement of the policy are too great.

18. Positive legislative outcomes may also be the result of "affinity" or sympathy from legislators in a position to bestow them. An elected official may decide not to support a bill or policy proposal that discriminates against, singles out, or mistreats a minority group because he or she independently believes that discriminating against, singling out, or mistreating the minority group is wrong. But since these pledges or outcomes are not the result of an exercise of political power by the minority group, they are not necessarily indicative of a group's actual political power. Moreover, they are significantly more vulnerable to reversal than those achieved through the exercise of actual power. The affinity or sympathy that gave rise to the support could dissipate or flatten, and is likely to be abandoned in the face of subsequent opposition, and in the absence of sufficient power and influence of the minority group to counter opposition.

19. For example, in the 2011 legislative debate over the legalization of marriage for same-sex couples in the Maryland House of Delegates, several members of the chamber who had co-sponsored the legislation—and even some who had solicited endorsements and donations during the election cycle on this basis—ultimately voted against it in committee, publicly announced their intention to vote against it on the floor, and subsequently did so. These legislators' apparent support in the earlier stage of the legislative process was costless, and withered in the face of

mobilized opposition and as an actual roll-call vote approached.

20. Following Dahl's understanding, power can be illustrated only in comparison to a baseline understanding of the decision-makers' preferred actions. That is, to demonstrate that power had been at work, one would need to observe successful instances of opinion change on the part of a legislator in the face of positive or negative sanction or, alternatively, electoral change precipitated by the ire of the dissatisfied constituency.

21. Apparent policy "agreement" is a particularly erroneous measure of power when mere "agreement" requires no action on the part of the policy-maker. Again, the example of candidates and officials endorsing a policy position, only to recant that support when an actual vote approaches, illustrates the illusory nature of this form of support.

22. My opinion does not rest on the extreme assumption that in no place, at no time, under any circumstances, have gay men and lesbians won any outcome.

23. Rather, my view is that one must weigh the relative impact of positive and negative outcomes against the numerosity of moments of contestation and the insecure nature of legislative gains. Policy "successes" should not be considered in isolation. While legislative gains have occurred in some states and localities, numerous jurisdictions have adopted statutes and constitutional amendments expressly in opposition to the interests of gay men and lesbians. Even an assessment of "trend" requires consideration of the relative frequency of positive and negative

Social stigma is reflected both in the acts of individuals and in the institutions of society, including its laws, that legitimate and perpetuate the second-class status of gay men, lesbians, bisexuals, and same-sex couples.

56. By denying state recognition to married same-sex couples, Ohio's 2004 statutory and constitutional amendments both reflect and perpetuate stigma against lesbians, gay men, and same-sex couples. These laws devalue and delegitimize the relationships of legally married same-sex couples. By giving heterosexuals exclusive access to the benefits associated with the institution of marriage, these laws perpetuate power differentials between heterosexual citizens and non-heterosexual citizens. Ohio law signals that in the eyes of the state, the committed relationships of same-sex couples are inferior to different-sex relationships and that partners in same-sex relationships, even those recognized as legal marriages by another state's government, are less deserving of social recognition and government protection. The stigma perpetuated by Ohio law affects not only individuals in committed relationships with a person of the same sex, but all gay, lesbian, and bisexual individuals as a group.

VI. There Is No Evidence That Heterosexual Relationships Would Be Harmed If Same-Sex Couples Were Permitted To Marry

57. For many decades, social scientists have studied and analyzed the factors that contribute to rates of divorce.[48] There is a scientific consensus about the key factors that may be responsible. First, increasing employment opportunities for women have

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[48] Cherlin, 2009; Coontz, 2007; Bramlett & Mosher, 2002; Teachman, 2002.

led to a dramatic increase in the percentage of married women in the workforce. Paid employment gives wives greater economic independence from their husbands, which in turn makes it more feasible to end an unhappy marriage. Second, since the 1970s, economic opportunities for men without college education have diminished, adding financial stress to the lives of some married couples. Third, there have also been important changes in public attitudes. Public acceptance of divorce has increased, as has the social acceptability of unmarried cohabitation. Some scholars also suggest that a growing emphasis on individualism and personal fulfillment has eroded an earlier emphasis on the importance of obligation and commitment in marriage. Fourth, state "no-fault" divorce laws have made it easier for spouses to end their relationships.

58. In addition, research has identified several demographic characteristics that are associated with an increased likelihood of divorce.[49] First, age at marriage matters: people who marry as teenagers are more likely to divorce than those who are in their 20s or older. Second, unemployment and low incomes are associated with greater rates of divorce. Third, so too is race or ethnicity; African Americans have significantly higher rates of marital separation, Asian Americans have lower rates, and other groups fall in between. Fourth, individuals whose parents divorced while they were growing up are at greater risk of divorce. Although a correlation exists, there is no scientific evidence that these demographic characteristics in and of themselves cause relationships to end. When spouses are similar to each other

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[49] Amato, 1996; Bramlett & Mosher, 2002; Heaton, 2002; Lehrer & Chiswick, 1993; Raley & Sweeney, 2007.

with regard to such characteristics as religion and age, the risk of divorce is lower.

59. None of these factors uniquely correlates with same-sex couples or with allowing them to marry. Allowing same-sex couples to marry would not alter state marriage laws, economic opportunities for married heterosexual women or men, public attitudes toward divorce or cohabitation, or personal values of individualism or commitment. Nor would it affect the age at which heterosexuals decide to marry, their personal history of parental divorce, their choice of a similar or dissimilar partner, or their race or ethnicity. Indeed, the fact that lesbians and gay men, a class of citizens denied legal marriage, are seeking to obtain marriage rights could be seen as beneficial, because it broadens the scope of support for the value of marriage as a central social institution in American society.

60. Allowing same-sex couples to marry would not affect the quality or stability of different-sex relationships. The quality of a heterosexual couple's marriage depends on such factors as the spouses' personalities, their communication styles and ways of handling conflict with each other, the stress a couple experiences, and the social support and resources available to the couple. None of these factors is altered if a same-sex couple living down the block gets married. In addition, the stability of marriages between different-sex couples depends on barriers to divorce, including investments the spouses have made in each other and their relationship, their moral and personal convictions about marriage, the options they see available outside of marriage, and the many legal, financial, and social obligations that come with a marriage license. These factors are not influenced by the marital status of other couples. In short, there is no scientific basis

for the proposition that allowing same-sex couples to marry would affect the underlying processes that foster stability in different-sex marriages.

61. In response to an effort to ban marriage for same-sex couples, the Executive Board of the American Anthropological Association, the world's largest organization of anthropologists, issued the following statement:

> The results of more than a century of anthropological research on households, kinship relationships, and families, across cultures and through time, provide no support whatsoever for the view that either civilization or viable social orders depend upon marriage as an exclusively heterosexual institution. Rather, anthropological research supports the conclusion that a vast array of family types, including families built upon same-sex partnerships, can contribute to stable and humane societies.[50]

62. Empirical evidence demonstrates that legalizing marriage for same-sex couples does not affect either marriage or divorce rates for different-sex couples. An examination of statistical data from Massachusetts, where marriage for same-sex couples became available in 2004, indicates that marriage of same-sex couples has not led to a decline in marriage nor to an increase in divorce. In the four years prior to when same-sex couples were permitted to marry (2000-2003), the average marriage rate was 5.9 marriages per 1,000 total population in the state. In the seven years after same-sex couples were permitted to marry (2004-2010), the average marriage rate was

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[50] American Anthropological Association, 2004.

also 5.9. In the four years prior to when same-sex couples were permitted to marry (2000-2003), the average divorce rate was 2.5. In the seven years after same-sex couples were permitted to marry (2004-2010), the divorce rate was lower, averaging 2.2.[51] Similarly, a recent study that examined the rates of different-sex marriage in each state and the District of Columbia from 1988 to 2009 found that the availability of marriage for same-sex couples did not affect different-sex couples' rates of marrying.[52]

63. The finding that the availability of marriage for same-sex couples lacks a correlation with the rates of marriage or divorce among different-sex couples is entirely consistent with our scientific knowledge about why people choose to marry and the factors associated with divorce.

64. In short, empirical data demonstrate that marriage by same-sex couples does not harm marriage for different-sex couples. Marriage by same-sex couples does not deter different-sex couples from marrying nor pose a threat to the stability of marriage for different-sex couples.

Signed under penalty of perjury this 10th day of October, 2013.

/s/ Letitia Anne Peplau
Letitia Anne Peplau, Ph.D.

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[51] Marriage rates by State: 1990, 1995, and 1999-2010, Division of Vital Statistics, National Center for Health Statistics, CDC. Available at: http://www.cdc.govinchs/datainvss/maniagerates909599-10.pdf. Divorce rates by State: 1990, 1995, and 1999-2010, Division of Vital Statistics, National Center for Health Statistics, CDC. Available at: http://www.cdc.govinchs/datainvss/divorce_rates_90_95_99-10.pdf. (last accessed February 7, 2013).

[52] Dinno & Whitney, 2013.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed 10/11/13]

Civil Action No. 1:13-cv-501

JAMES OBERGEFELL, ET AL.,

Plaintiffs,

v.

THEODORE WYMYSLO, ET. AL.,

Defendants.

Judge Timothy S. Black

EXPERT DECLARATION OF GARY M. SEGURA IN SUPPORT OF PLAINTIFFS' MOTION FOR DECLRATORY JUDGMENT AND PERMENANT INJUNCTION

I, Gary M. Segura, Ph.D., pursuant to 28 U.S.C. §1746, hereby declare and state under penalty of perjury that I am an adult over the age of 18 and am competent to testify to the following matters if called as a witness and that these are my true and correct opinions:

PRELIMINARY STATEMENT

I. Expert Background and Qualifications

1. I am a Professor of American Politics in the Department of Political Science at Stanford University. I have been retained by counsel for Plaintiffs as

an expert in connection with the above-referenced litigation. I have actual knowledge of the matters stated in this declaration and could and would so testify if called as a witness. My background, experience and list of publications from the last 10 years are summarized in my curriculum vitae, which is attached as Exhibit A to this Declaration.

2. In the past four years, I have testified as an expert—either at trial or through declaration—or been deposed as an expert in *Darby v. Orr,* Nos. 12-CH-19718 and 12-CH19719 (Cir. Ct. of Cook County, Ill.), *Windsor v. US.,* No. 10 Civ. 8435 (BSJ) (JCF) (S.D.N.Y.), *Dragovich v. US. Dep't of the Treasury,* CV 4:10-01564-CW (N.D. Cal.), *Golinski v. Office of Personnel Management,* 824 F. Supp. 2d 968 (N.D. Cal. 2012), *Perry v. Schwarzenegger,* 704 F.Supp. 2d 921 (N.D. Cal. 2010), *Gill v. Office of Pers. Mgmt.,* 699 F. Supp. 2d 374 (D. Mass. 2010), *Massachusetts v. United States HHS,* 698 F. Supp. 2d 234 (D. Mass. 2010), *Pedersen v. Office of Personnel Management,* No. 3:10-cv-01750-VLB (D. Conn.), *Jackson v. Abercrombie,* Civ. No. 11-00734 ACK-KSC (D. Haw.), *Cooper-Harris v. United States,* CV 12-887 CBM (AJWx), *Sevcik v. Sandoval,* No. 2:12-CV-00578-RCJ-PAL and *Satorre v. San Mateo County Board of Supervisors,* CIV504866.

3. I received a Ph.D. in American Politics and Political Philosophy from the Department of Political Science at the University of Illinois in Urbana-Champaign in 1992. My tertiary field of emphasis was political methodology. My MA was also from the University of Illinois in 1990, and I earned my undergraduate degree from Loyola University of New Orleans in 1985.

4. I am also the founding Director of the Institute on the Politics of Inequality, Race and Ethnicity at

Stanford, and the founding co-Director of the Stanford Center for American Democracy. In the latter role, I am one of the Principal Investigators of the American National Election Studies for 2009-2013, the premier data-gathering project for scholars of American elections.

5. My primary emphases in my scholarly research and writing are on public attitudes, opinion, and behavior with respect to politics, and minority group politics. I have taught classes on elections, public opinion, representation, Congress, Latino politics, gay and lesbian politics, race and racism, the Voting Rights Act, inequality and American democracy, interest group politics, philosophy of science, research design, and statistical analysis (introductory and advanced).

6. To date, I have authored 49 article-length publications in professional journals and edited volumes. Those journals include the *American Political Science Review,* the *American Journal of Political Science, Political Research Quarterly, Political Behavior,* and the *Journal of Politics.* I edited *Diversity in Democracy: Minority Representation in the United States,* published by the University of Virginia Press in 2005. I am also the co-author of *Latino Lives in America: Making It Home,* addressing new patterns of Latino life and politics in the U.S., published by Temple University Press in 2010. I have a third book that was published in 2011 with Congressional Quarterly Press, entitled *"The Future is Ours: " Minority Politics, Political Behavior, and the Multiracial Era of American Politics,* a comparative exploration of political behavior across American racial and ethnic minority groups and how such behaviors will shape American party coalitions in the

9. I am being compensated for this effort at a rate of $250.00 per hour. I will be compensated at $350.00 per hour for work performed while traveling, and I will be reimbursed for expenses incurred while traveling in connection with my services. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

II. Summary of Conclusions

10. Gay men and lesbians do not possess a meaningful degree of political power and are politically vulnerable, relying almost exclusively on allies who are regularly shown to be insufficiently strong or reliable to achieve their goals or protect their interests. The powerlessness of gay men and lesbians is evidenced in numerous ways, and they are subject to political exclusion and suffer political disabilities greater than other groups that have received suspect classification protection from the courts.

III. Political Powerlessness in General

11. Any evaluation of the political power of a particular group in the United States, or in any particular state, takes place in the context of a general understanding of the role that groups play in American politics. From James Madison onward, American democracy frequently has been understood as a pluralist system, in which competition among groups should ideally ensure that no one interest becomes permanently dominant, or determines outcomes over a large number of decisions over a long time. Madison believed that in an "extended" republic, coalitions commanding the day on one issue would dissolve and be replaced by a different majority coalition on the next issue.

12. Modern political scientists generally approach pluralism through the concept of group interests. In what David Truman calls "disturbance" theory, the action of one group raises challenges to the interests of another, causing the latter to react, and preventing a single interest from dominating the political process. However, scholarly work on collective action (including Mancur Olson among others) has found that not all groups have an equal opportunity to form and act successfully to stave off threats to their interests. Differences in group size, resources, and position in the class structure mean that some groups are inherently better positioned to act on their own behalf than others, and some groups suffer a permanent disadvantage that places them at the mercy of others. Reflecting this concern, eminent political scientist Elmer Eric Schattschneider famously wrote, "The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent." Those with greater resources—time, money, and numbers—exert greater influence on the political process. Minorities, by definition, are less numerous than the majority.

13. The existence of societal prejudice against a particular group makes the accumulation of resources, including finances and allies, more difficult. Moreover, that same prejudice imposes an additional systematic burden because it tends to prevent that group's interests or policy preferences from receiving due consideration by other actors in the political process, or causes that consideration to be sacrificed for the sake of political expediency. Relative to minority groups that are otherwise similarly situated, a group that suffers such prejudice does not receive an equivalent hearing in political contestation and debate. Constitutions (and courts, through judicial

coming decades. I am the co-author of a fourth book, *Latinos in the New Millennium: An Almanac of Opinion, Behavior, and Policy Preferences,* which was published in 2011.

7. I am the former President of the Midwest Political Science Association (MPSA), the second-largest organization of American political scientists. In 2006, I was the General Program Chair of the MPSA Annual Meeting. In 2011, I was elected Vice-President and Program Chair of the Western Political Science Association for 2012-2013, and will serve as President in 2013-14. In addition, I am a member and former Executive Council Member of the American Political Science Association, member and former Executive Council Member of the Western Political Science Association, and member of the Southern Political Science Association. I serve or have served on the editorial boards of the American Journal of Political Science, Journal of Politics, and Political Research Quarterly. I am a member of the Sexuality and Politics organized section of the American Political Science Association, have served on the Southern Political Science Association's Committee on the Status of Gays and Lesbians, and was part of the Executive Committee of the Sexuality Studies Program at the University of Iowa.

8. In preparing this declaration, I reviewed the Complaint in this case and the materials listed in the attached list of sources (Exhibit B). I rely on those documents, in addition to the documents specifically cited as supportive examples in particular sections of this declaration, as support for my opinions. I have also relied on my years of experience in the field of political science, as set out in my curriculum vitae (Exhibit A).

25. Even positive outcomes for gay men and lesbians that are secured through court rulings are vulnerable to popular or legislative rollback. For example, in response to the Iowa Supreme Court's ruling that lesbians and gay men could not be excluded from the institution of civil marriage, anti-gay forces like the National Organization for Marriage organized a nationally funded campaign to defeat three of the members of that court in judicial retention elections in November 2010, and were ultimately successful in defeating all three. Though a fourth removal attempt was defeated 2012, the earlier defeat of state jurists facing retention elections has the dual effect of weakening that court's majority—raising the possibility of their reversing the previous decision—as well as chilling similar action by jurists in other states whose judicial views might otherwise lead them to similar conclusions.

26. Furthermore, many of the policy "successes" that have benefitted gay men and lesbians are measures that remediate or repeal express, de jure discrimination against the group. Remediation of existing discrimination and disadvantage should be distinguished from affirmative political power. For example, the adoption of hate crimes statutes inclusive of sexual orientation, in Illinois and elsewhere, while a "success" for gay men and lesbians, was necessary only because there is such prevalent bias-related violence against gay men and lesbians. While a fair assessment of the relative political "power" of gay men and lesbians would include the adoption of such legislation, it must also include a consideration of the underlying behavior and bias that gave rise to the need for the legislation, which is an indicator of political powerlessness, not strength.

27. In light of the political disadvantages still faced by a small, targeted, and disliked group, I conclude that gay men and lesbians are powerless to secure basic rights within the normal political processes.

28. Traditional markers of political powerlessness include systematic disadvantages in the political process; the existence of significant prejudice, stigmatization, or de facto or de jure second-class status; or an inability, alone or in concert with reliable coalition partners, to secure basic rights or equal treatment from and within the political process. Here, I organize traditional markers of political powerlessness into two categories: (1) manifestations of power and powerlessness, on which gays and lesbians score poorly; and (2) factors that contribute to political disadvantage, on which gays and lesbians—to their detriment—score high.

IV. Political Powerlessness of Gays and Lesbians

A. Manifestations of Political Powerlessness

29. Although an exhaustive catalog is impossible, the lack of meaningful political power possessed by gay men and lesbians is reflected in numerous features of the nation's laws, institutions, and political history that are adverse to policy outcomes favored by and important to gay men and lesbians. Some examples are discussed below. The political powerlessness of gay men and lesbians is evidenced by their inability to bring an end to pervasive prejudice and discrimination, and to secure desired policy outcomes and prevent undesirable outcomes on fundamental matters that closely and directly impact their lives. Furthermore, the demonstrated vulnerability of occasional and geographically confined policy gains to reversal or repeal is indicative of a role played by

equality is subject to repeated challenge and popular repeal, remains.

43. Adoption—In five states, gay men and lesbians are prohibited from adopting children. Some of these bans were adopted recently. For example, in 2008, Arkansas voters adopted Arkansas' Act One, which prohibited adoption by unmarried cohabitating couples, an act conceived with regard to—and targeted at—same-sex couples. Act One was struck down in April 2011 as an unconstitutional infringement on the right to privacy by the Arkansas Supreme Court. That decision notwithstanding, it is possible, and I think likely, that these initiatives or legislative actions will appear elsewhere in the future. Indeed, Arizona recently enacted a statutory preference for heterosexuals in the state's foster and adoption programs. In the 2012 American National Election Study, 35.8% of respondents nationwide felt that gay men and lesbians should be prohibited from adopting.

44. Thus, beyond the obstacles gay men and lesbians face in the traditional legislative process, ballot initiatives further disadvantage them politically and have undone many of the benefits they have obtained through legislative action. The success of anti-gay ballot initiatives, moreover, makes it less likely that legislatures will enact pro-gay policies in the first place (Lax and Phillips 2009), because elected officials will fear having their actions overturned by angry constituents. Moreover, many gay and lesbian activists fear that the reactive post-initiative policies will be worse than the status quo, thereby forcing them to consider whether foregoing legislative policy change in the first instance is actually in the best interests of the group. For example, several successful anti-marriage ballot initiatives also prohibited civil

unions and domestic partnerships, removing benefits that had existed prior to the enactment of the anti-gay ballot initiatives.

45. Ballot initiative campaigns are frequently polarizing, are built on enormous sums of money, and are waged primarily in the non-deliberative media of mass advertising. Small minorities are even less able to protect their interests in these kinds of contests than they are in the legislative process, which—as a result of legislative districts, institutional rules, coalitional politics, and other factors—tends to give smaller minorities more of an opportunity to prevent undesirable outcomes. The passage of Proposition 8 in California and Question 1 in Maine both illustrate that coalition politics are more easily broken down in popular vote situations where misleading messages can circumvent community leaders and office holders.

46. Although the use of the initiative process against gay and lesbian policy goals is a comparatively recent phenomenon, in the past, ballot initiatives were used to undo legislative gains by immigrants, non-English speakers, African Americans, and minorities generally, including overturning fair housing statutes, affirmative action programs, and bilingual education, and establishing English as an official language. Historians of the turn-of-the-century progressive movement, when these direct democracy processes were established and written into the laws of the western states, note the association of progressive reforms with anti-immigrant sentiment (among other factors). Indeed, the progressive movement created the initiative process in order to allow the majority to overturn decisions made by legislatures, which allow a greater role for bargaining and coalitional politics. But the initiative process has now been used

specifically against gay men and lesbians more than against any other social group.

47. While there has been an increase in state and local jurisdictions with statutory anti-discrimination protections for gay men and lesbians over the last two decades, these legislative successes have been resisted strongly at the ballot box. Again, in three-fifths of the 50 states, voters have amended their state constitutions to establish formal political and social inequality for gays and lesbians. Similar proposals to amend the federal constitution have also been considered.

(3) Underrepresentation in Political Office

48. Gay elected officials have risen to various offices around the country. These representatives may strive to advocate for gay and lesbian rights, but their numbers and limited legislative impact on issues concerning those rights continue to demonstrate significant under-representation and reliance on friendly, heterosexual representatives, over whom gay men and lesbians hold no direct political power. For example, 85 state legislators nationwide are openly gay, but the total number of state legislators nationwide is 7,382, so those 85 legislators represent only 1.2% of the total. A recent study by the Williams Institute estimated the gay, lesbian and bisexual population of the U.S. to be approximately 3.5%. Under even the most conservative estimates of gay and lesbian population share, this number indicates that gays and lesbians are substantially under-represented. Prior to 1990, only four openly gay men or lesbians were members of state legislatures.

49. There have been only 11 openly gay or bisexual members of Congress in history, and only eight total, seven in the House and one in the Senate, serve today

outcomes and the stakes involved in each of the policy debates.

24. Policy successes—whether at the state or federal level—are insecure so long as the rights and legal status of lesbians and gays remains a subject of legislative action. We must consider the frequency with which legislative gains have been repealed, turned back by the voters, or foregone altogether, as well as the serious risk of repeal of legislative gains after each election cycle in which political power shifts to a different political party. Recent policy modifications, such as the adoption of a mechanism that led to the end of the "Don't Ask, Don't Tell" policy, illustrate precisely this dynamic. Several prospective Republican presidential candidates who ran for office in the 2012 Republican primary expressed support for a repeal of this legislation and the reinstatement of "Don't Ask, Don't Tell," a view also shared by members of the House majority. Reinstating Don't Ask, Don't Tell was an explicit plank in the 2012 Republican platform. Similarly, after the Maine legislature passed legislation in 2009 to provide same-sex couples access to marriage, voters overturned the law a few months later by referendum. The Washington and Maryland legislatures also enacted legislation last year to allow same-sex couples to marry, but opponents of the legislation gathered sufficient signatures to subject both measures to a referendum by popular vote in November 2012. Both referenda failed, and Maine ultimately reinstated marriage for same-sex couples in another initiative, last year. Those favorable results, however, should be examined against the broader backdrop: even occasional political successes of gay men and lesbians are subject to repeated challenge at the ballot box and, recent successes notwithstanding, they lose an exceedingly high percentage of the time.

"affinity" or sympathy, rather than the exercise of meaningful political power by gays and lesbians.

(1) Absence of Statutory Protection/Presence of De Jure Statutory Inequality

30. To date, there is no federal legislation prohibiting discrimination against gay men and lesbians in employment, education, access to public accommodations, or housing. Nor is there any protection of this nature under Ohio law. Indeed, the history of the Employment Non-Discrimination Act (ENDA) provides a good example of gay men and lesbians' inability to compel policy outcomes for which they actively advocate. ENDA, which would extend employment protections on the basis of sexual orientation (and in some versions, gender identity) has been introduced regularly since 1994 (with earlier versions existing as far back as the 1970s), but has never passed both houses of Congress. It has failed to win passage in both Republican-and Democratic-controlled Congresses. While the legislation attracts many "co-sponsors," one cannot test the reliability or strength of this support in the absence of a recent and meaningful vote, or any realistic chance of its passage. The almost complete absence of legislative progress on the issue suggests that, at the very least, it is not a legislative priority for most legislators or the leadership of either party and, at worst, that the "support" is rhetorical and without substance.

31. In 1996, Congress adopted the "Defense of Marriage Act," or DOMA, which, among other things, prevented even legally married same-sex couples from filing joint tax returns, inheriting social security benefits, and obtaining all of the other rights afforded to married individuals by federal law. This preclusion

of rights acquisition was signed into law by a Democratic president. Until recently, litigation against DOMA was actively resisted by both Democratic and Republican administrations. Indeed, until February 2011, the Obama Justice Department defended the constitutionality of DOMA despite the administration's public support for its legislative repeal. And the decision by the Department of Justice to cease its defense of DOMA in court came only after one house of Congress passed into the control of the opposite party, thus allowing that body the opportunity to intervene in the litigation. In short, it was a change of course without immediate practical effect. The same is true for President Obama's and Vice President Biden's announced personal support for the freedom to marry for same-sex couples, and the addition of this position to the Democratic platform in 2012. Their personal views and the platform have no practical effect on the exclusion from marriage faced by same-sex couples across the country. More to the point, in no instance can we identify an effect of lesbian and gay political power at work, here. Gay and lesbian voters were in no position to insist on these changes, nor are they able to compel candidates across the party to abide by them. Properly understood, they reflect affinity of the current President and the platform committee, but not power.

32. Ohio adopted a state level "DOMA" statute in 2004. It was adopted by huge margins in both chambers. That same year Ohio voters passed a state constitutional DOMA amendment, also by a wide margin.

33. Despite a long-documented record of violence against gay men and lesbians, attempts to extend existing federal hate crimes to include violent crimes

based on the perceived sexual orientation of the victim reached fruition only in 2009, after more than a decade of advocacy by civil rights groups and supporters. Previously, gays and lesbians enjoyed virtually no such federal protection. The legislative process that produced even this positive outcome is illustrative of the political powerlessness of gay men and lesbians. To provide political cover, the bill extending hate crimes protections to gays and lesbians was attached to and adopted as part of a Defense Appropriations Bill. Even under these circumstances, 75% of Republican members of the Senate voted against it. In the House of Representatives, 131 of 175 Republican members voting (again, 75%) also opposed the hate crimes provision, illustrating at once the depth of opposition to even ameliorative measures that benefit gay men and lesbians, as well as the fragility of the institutional support for such outcomes. It is again worth noting that the impetus for this legislation was the pattern of violence directed at gay men and lesbians, a circumstance that provides important context for why the adoption of such a provision need not represent an exercise of "power."

34. In 1993, Congress codified the military's "Don't Ask, Don't Tell" (DADT) policy, under which lesbians and gay men were required to conceal their sexual orientation in order to serve in the military, were investigated if suspected to be gay, and were discharged if they disclosed or were found to be gay. Like the "Defense of Marriage Act," this legislation was signed by a Democratic president. In December 2010, Congress adopted a provision with an administrative mechanism that led to the end of this policy. But the circumstances under which even this positive outcome was achieved highlight the ultimate political powerlessness of gays and lesbians. The

DADT policy was in effect for over 17 years and, despite significant evidence of abuse—including discharges initiated based on unsubstantiated allegations and third-party accusations, and aggressive investigations beyond the bounds of the policy—and its cost to the military, repeal had not seriously been considered. Both Republican and Democratic administrations defended DADT in court. The current Democratic administration discouraged legislative attempts to attach legislation repealing DADT to the Defense Authorization bill in the summer of 2010, or indeed at any point prior to the November 2010 election. There was no legislative action on the policy for most of the 111th Congress, beyond committee hearings, and despite widespread shifts in public opinion on this issue, no final action was taken prior to the general election. When the matter was finally taken up during the lame-duck session, Republican members offered fierce opposition in both legislative chambers. Of 175 votes cast in the House by Republican Party members, 160 (or 91.4%) were against the provision to repeal DADT. In the Senate, 31 of 39 Republican senators (79.5%) opposed the repeal. Like the hate crimes legislation, the DADT repeal illustrates the limited access gay men and lesbians have to the legislative process because of such stalwart opposition.

35. On the state level, there is no statutory protection against discrimination in employment or public accommodations based on sexual orientation in twenty-nine states.

36. While there is an executive order in place protecting state workers from discrimination based on sexual orientation, at least five bills aimed at outlawing private discrimination based on sexual

orientation have failed in recent years in the Ohio legislature.

37. De jure inequality also exists in state constitutional law. In 1990, there was not a single state constitutional provision that targeted gay men and lesbians for unequal treatment. Today, in over three-fifths of the states there is now constitutionally-established inequality—that is, the exclusion of gay men and lesbians from the civil institution of marriage is formally written into the framework of government. Indeed, voters in many states, like in Ohio, passed ballot initiatives to amend their state constitutions to prohibit same-sex couples from marrying even after the state legislature had already passed statutes barring same sex couples from marrying. At least 10 additional states, affirmatively exclude gay men and lesbians from civil marriage by statute but have not yet amended their constitutions.

38. The presence of domestic partnership and civil union laws adopted in various states, rather than viewed as an "accomplishment," is best understood as an illustration of the political weakness of gay and lesbian political efforts. These laws are enacted for one of two reasons: either (1) civil marriage for same-sex couples is politically unattainable in a state, either through the array of existing political forces or the presence of a constitutional bar—which also illustrates the weakness of lesbian and gay politics—or (2) the enactment of a domestic partnership or civil union law would have the effect of complying with a court order to address gay and lesbian exclusion, as was the case when Vermont originally adopted civil unions. Notably, in Vermont, the civil union law was the legislature's way of not granting civil equality to lesbian and gay citizens, despite a court order.

(2) Repeal or Pre-Emption of Legislative or Judicial Protections Through Ballot Initiatives

39. Evidence from the past two decades in particular has demonstrated that gay men and lesbians are especially vulnerable in the context of direct democracy. That is, positive legislative outcomes achieved at the state and local levels are often insecure. Initiatives and referenda frequently and effectively have been used to reverse or pre-empt the legislative grant at the state or local levels of policies benefiting or protecting gays and lesbians. These ballot initiatives can be broken into three groups: (1) those which overturn anti-discrimination policies, (2) anti-marriage initiatives, and (3) restrictions on adoption.

40. Overturning anti-discrimination policies—The first wave of ballot actions on gay and lesbian rights began in the early 1970s, but reached its peak in the 1990s. The most common form was citizen initiatives to overturn municipal, county, or state extensions of antidiscrimination policies to sexual orientation. These ballot actions were generally successful. Legislative enactments were overturned in cities and counties across the country, including Santa Clara County and the City of San Jose, California; Tacoma, Washington; Lewiston, Maine; Lansing, Michigan; St. Paul, Minnesota; Wichita, Kansas; Cincinnati, Ohio, and perhaps most famously, Miami-Dade County, Florida. A very small number of pro-gay votes also occurred and, not surprisingly, did not fare as well, including the defeat of a voter attempt to compel the Davis, California City Council to enact a gay rights ordinance. Haider-Markel and colleagues (2007) identified 143 votes from the 1970s through 2005, and found that gay and lesbian rights were defeated or

overturned in more than 70% of the cases—with the opponents of those rights prevailing at about the same rate for local and state elections. The frequency of electoral and policy conflict over non-discrimination statutes declined once the focus of the struggle increasingly centered on preventing legal recognition of same-sex couples' relationships. It is worth noting that many anti-gay measures amended city charters or state constitutions to increase the burden on gays and lesbians and their supporters for accomplishing policy change, such as Colorado's Amendment 2, struck down by the Supreme Court in *Romer v. Evans, 517* U.S. 620 (1996). The general approach of such measures was to prohibit legislative action preemptively, and require that any change be through popular, majority vote (with all of the disadvantages for minority rights this carries). Most recently, the state of Tennessee adopted a new "antidiscrimination" law in May of 2011 that specifically forbids any jurisdiction from enacting any anti-discrimination measures that go beyond the protections in state law (which currently excludes lesbians, gay men, bisexual and transgender people from all anti-discrimination protections). As a result, Nashville's two ordinances protecting gay men and lesbians from workplace discrimination were rendered unenforceable. Similar measures are being advocated in other state legislatures.

41. Anti-marriage initiatives—In 2004 alone, ballot initiatives prohibiting marriage for same-sex couples passed in 13 states. To date, gay and lesbian marriage prohibitions have been voted on at the state level 38 times, most recently in North Carolina, Minnesota, and Maine in 2012. In only two instances did the pro-gay position win. First, when Arizona's Proposition 107, which also would have affected unmarried

heterosexual couples, failed in 2006; the constitutional amendment passed handily in 2008 when it was narrowed to affect only gay men and lesbians. (Colorado, likewise, had multiple items, two competing anti-marriage initiatives and one referendum. The harshest initiative, which would also have outlawed civil unions and domestic partnership, failed to qualify for the ballot. On election day, the referendum, which would have confined marriage to opposite-sex couples but award lesbian and gay couples domestic partner rights failed, while the remaining anti-marriage initiative passed on the same day.) In 2012, North Carolina adopted an anti-marriage amendment. Minnesota, in 2012, provided the only other example of anti-gay forces failing to write inequality into the state's constitution.

42. In Maine, the state legislature managed to adopt marriage for same-sex couples through statute. That policy success was short lived, as a popular majority was able to overturn legislative action and reinstate the ban on marriage between same-sex couples through statewide ballot on "Question 1." This outcome was secured with massive intervention from national anti-gay organizations, such as the National Organization for Marriage, as well as substantial investment by religious organizations, including the Roman Catholic Church, whose role was documented and touted in Catholic media sources. Campaign materials used by interests opposing the freedom to marry were, in some instances, identical to those used in the campaign to repeal marriage for same-sex couples in California via Proposition 8, illustrating the vast and national reach of those interests working against the interests of gay men and lesbians. This year, that change was overturned with a new initiative. But the lesson, that gay and lesbian political

(7) Political and Social Hostility

76. Gay men and lesbians face outspoken denunciation by elected officials in a manner that would be unthinkable if directed toward almost any other social group. Hostility by public officials is often directly mirrored in the population. Furthermore, its public nature, even when articulated by only a small segment of office-holders and officials, serves as a signal to the broader population that these discriminatory attitudes are "acceptable" or reasonable within the bounds of mainstream political discourse.

77. Gay men and lesbians have been described by a sitting U.S. Senator as "the greatest threat to our freedom that we face today." Another sitting senator, during his successful campaign, openly called for gay men and lesbians to be banned from the classroom, a claim he repeated at a public rally. A third senator compared same-sex marriage to marrying "a box turtle." He was subsequently reelected with a large margin. Same-sex intimacy has been described by a sitting senator as morally equivalent to incest and bestiality. In 2010, the GOP nominee for governor of New York responded to a question about marriage for same-sex couples by saying that "we should stop pandering to pornographers and perverts...." The social and political disadvantage that flows from these very public and derisive comments is palpable.

79. While there may be pockets of tolerance here or there at the state and local levels, and occasionally successful gay or lesbian candidates, in large swaths of the nation, political condemnations of gay men and lesbians are not electorally costly and may even be used to gain electoral support. It is difficult to identify many cases where an elected official was so damaged by holding anti-gay positions that he or she lost public

office on this basis, but there are countless cases across the country where candidates felt advantaged by taking a particularly harsh anti-gay viewpoint. In part, this is a consequence of the partisan and geographic distribution of views and the nature of our legislative representation regime, but in part this is also a reflection of the fact that pro-gay policies are a very low priority even among "allies" in the population who hold generally positive views. Public contempt extends beyond elected officials to prominent national religious leaders, who command the attention of political leaders as well as significant numbers of the electorate.

(8) Unreliable Allies

80. The structure of the American party system is such that the path to pro-LGBT equality policy change lies almost exclusively through the actions of one party. The increasing power of evangelical Christians and self-styled "Tea Party" advocates in the GOP has shifted this party's social policy further to the right and all but eliminated its once sizable tradition of libertarianism. Many within the Republican Party in office (and the national Republican platform) are openly hostile to gay and lesbian rights. The nearly complete disinterest of one party severely disadvantages gay men and lesbians, since gay men and lesbians can thus be understood as "captured" by the Democratic Party, that is, unlikely to bolt from the party or abstain from voting for it in large numbers. Under these circumstances, the capturing party can take the political support of the group for granted.

81. Although the Democratic Party is more supportive in its rhetoric, and the Democratic platform speaks favorably regarding equality for lesbians and gay men,

Democrats have repeatedly shrunk from any extension of rights to gay men and lesbians at the federal level. Democrats controlled the White House from 1993 to 2001, and the Congress until 1994 and from 2006 to 2010. Nevertheless, nondiscrimination statutes and federal recognition of state-sanctioned marriages between same-sex couples remain undelivered. Again, "Don't Ask, Don't Tell" was passed in a democratically controlled Congress, and both it and the federal "Defense of Marriage Act" were signed into law by a Democratic president.

82. This is not to say that gay men and lesbians have no allies at all. Recently, the governors of New York, Maryland, Minnesota and Washington signed marriage bills into law. In the case of Washington State, the governor was not seeking reelection, but both other governors have future political aspirations. Their assistance weighs positively on my assessment of political resources of gays and lesbians. Their support, however, must be weighed against the vast majority of state governors, however, who offer no such support—costly or cost-free—or offer direct opposition to the political and social aspirations of gays and lesbians.

83. Gay men and lesbians are disadvantaged by the circumstance of party capture. The almost complete indifference or hostility of Republican elected officials to the political interest of gay men and lesbians largely confines their political opportunities for support and public office to a single party, the Democrats. Democratic leaders, mindful of this complete exclusion, are thus free to neglect and even occasionally set back gay and lesbian interests, secure in the knowledge that the other party does not represent a credible threat for peeling away voters. Gay men and lesbians may be

(1.6% of the House, 1% of the Senate). Four of those eleven were initially elected to the House with their sexual orientation not publicly known. Only seven members were first elected to the House without the benefits of incumbency and with widespread public familiarity with their sexual orientation, Jared Polis (D-CO), Tammy Baldwin (D-WI), David Cicilline (D-RI), Mark Pocan (D-WI), Sean Patrick Maloney (D-NY), Mark Takano (D-CA) and Kyrsten Sinema (D-AZ). Polis, Baldwin, and Pocan were elected in districts that are home to the flagship campus of their state universities—districts that are typically more tolerant than others in the state. Baldwin and Pocan were elected from the same district. Tammy Baldwin (D-WI) was elected to the Senate in 2012, the first openly-gay member of that body in the history of the republic. Gay and lesbian politicians are largely confined to a single political party. Gay Republicans face an extremely difficult time, and the few gay GOP elected officials who have emerged seldom last, most leaving power either through primary challenges or retirement in the face of pressure. There has never been an openly gay President, Cabinet level appointee, or Justice of the United States Supreme Court.

50. The percentages of gay and lesbian representation at the local level are lower still. In 2010, the Gay and Lesbian Leadership Institute identified 288 local elected gay or lesbian political officials serving on city councils, county commissions, school boards, and other local offices (http://www.glli.org/out_officials), which is an insignificant fraction of the total number of elected local officials. Over a decade ago, the Census Bureau reported that the number of elected officials nationwide was slightly over 511,000. Subtracting members of Congress and state legislatures, about whom I just reported, that leaves somewhat over

500,000 city, county, school, and local board officials, and only 288 (or .05%) were identified as openly gay. These officials are also concentrated in the coastal states and in Illinois. Some states have no openly-gay elected officials at all, and many more have just a very small handful.

51. In Ohio specifically, only two members of the state's legislature, which consists of a total of 132 members divided across two chambers (99 House of Representatives; 33 Senate), identify as gay or lesbian, constituting just 1.5% of the total. Both serve in the lower chamber, as there are no openly gay or lesbian members of the Ohio Senate.

B. Factors Contributing to Political Powerlessness

52. Numerous factors, often working in combination or in mutually reinforcing ways, contribute to the political powerlessness of gay men and lesbians. Furthermore, many of these factors—including public and political hostility, prejudice, censorship, and religious and moral condemnation—impose a political disability on gays and lesbians not suffered by groups of comparable size and geographic dispersion. I begin this section with demographic considerations and then discuss other, relational factors pointing to a degree of powerlessness that today is unique to gays and lesbians.

(1) Small Population Size and Geographic Dispersion

53. The simplest way to secure political representation and exercise some degree of influence over the political process is through numerical strength. The population strength of gay men and lesbians is not

close to being sufficient to obtain electoral predominance in a single jurisdiction, let alone change the composition of a legislature or Congress. There are no congressional districts with a majority population of gay and lesbian Americans. There are no municipalities of any size with a majority gay and lesbian population. Even in broadly identified gay-friendly communities, often places where migration to established lesbian and gay communities has significantly increased the gay population above the national average, gays and lesbians fail to reach majority status. A fair estimation of population suggests that gay men and lesbians have sufficient numbers to determine (or substantially influence) the outcome of only a few city council or county board seats, or state legislative districts, nationwide. At any level of aggregation above the precinct or neighborhood, there is no place with a gay majority.

(2) Effect of HIV/AIDS Epidemic

54. The AIDS epidemic has set back the gay community's potential for political action, in ways that are both obvious and not obvious. Through 2005, the Centers for Disease Control reported that just over 300,000 MSMs (a CDC term for men who have sex with men) had died of HIV/AIDS. Another 217,000 were living with AIDS. The loss of 300,000 potential voters, organizers, and leaders is a profound setback to a community whose population starts as a fairly small share of the society. Harder to calculate are the lost financial contributions to the political efforts of gay men and lesbians as a consequence of this epidemic. Gay men and lesbians have both raised substantial amounts of money for HIV-related research and social services, diverting resources that could otherwise be used to fight discrimination.

Further, gay net wealth is negatively impacted by the loss of income on the part of those who have died, and the partial loss of income and expenditures on healthcare from those still living with the disease. Some political observers suggest that a decade or more of gay activism was lost to the cause of gay equality as gay men and lesbians turned their attention to the more immediate threat of the epidemic. While gay men and lesbians do not have the resources—reliable allies, elected officials, votes, dollars, and organizational capacity—to be politically powerful, they have been further disadvantaged by the fact that HIV destroyed such a large segment of the community and consumed such a large portion of its resources. In addition to the direct resource and political costs, AIDS offered heterosexuals a new reason to stigmatize gay people and same-sex relations, and to resist political change that would have advanced gay equality.

(3) Violence

55. A crime can be classified as a hate crime when the victim is targeted because of his or her identity—generally race, ethnicity, religious identity, and gender, sexual orientation, or disability status. Hate crimes are unique in that the effects of the crime are understood—indeed intended—to reach beyond the person of the actual victim. The crime is best understood as an expression of animus toward an entire group, and is an attempt to intimidate other members of that group or otherwise constrain their future behavior. For example, racially motivated hate crimes against individual target-group-members can simultaneously express racial prejudice toward the individual, an entire group, and intimidate other group members from patronizing businesses, moving

to neighborhoods, enrolling in schools, or otherwise exercising their personal liberties.

56. Though broad federal hate crimes protections for gays and lesbians came into existence only recently, the FBI has collected data on hate crimes committed on the basis of perceived sexual orientation for a number of years, at least from jurisdictions that have chosen to report them, and the numbers are substantial. In the last year for which statistics have been published, 2009, the total number of hate crime incidents was 6,604, and 1,482 (17.8%) of those were on the basis of sexual orientation. In terms of single groups, only African Americans endured more incidents, and since they are roughly three times the population share as gays and lesbians, the likelihood that any given gay or lesbian citizen experiences an attack (that is, the per capita number of attacks) is considerably higher.

57. Reported hate crime incidents range from simple assault to murder. According to the FBI's statistics, in 2008, 73 percent of all hate crimes committed against gays and lesbians included an act of violence; 71 percent of all hate-motivated murders in the United States were of gay men and lesbians; and 55 percent of all hate-motivated rapes were against gays and lesbians.

58. FBI Hate Crimes reports for 2009 show that gay men, along with Jewish Americans, are the most likely to be victimized by a bias crime. The Southern Poverty Law Center ("SPLC") also suggests that steps forward in the cause of gay and lesbian equality seem to be associated with a subsequent surge in antigay violence, pointing to data immediately in the wake of the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Court struck down Texas'

sodomy law. The intimidation effect of hate crimes serves to undermine the mobilization of gays and lesbians and their allies and to limit their free exercise of simple economic and social liberties.

59. Recent years show no discernible decline in bias crimes against gays and lesbians. FBI statistics reporting the number of hate crimes against specific groups shows that anti-gay acts were as frequent in 2009 as they were in 2003.

60. In Ohio, specifically, the numbers from the 2009 report are very similar. Of the297 total hate crime incidents reported, 47, or 15.8% of the total, were identified as motivated from sexual orientation. The 2011 report indicates that 58 out of 228, or 25% of the total, were identified as motivated from sexual orientation. While the total number of hate incidents reported declined, the number of hate incidents motivated by sexual orientation increased, and by extension raising their share of the total.

(4) Invisibility

61. A unique aspect of gay and lesbian identity that distinguishes gays and lesbians from other minority groups—to their political disadvantage—is their relative invisibility. The scholarship on passing and self-identification suggests that members of repressed or targeted groups who have the ability to pass unobserved in the majority population may choose to do so if the costs of self-identification, in the form of family disapproval, physical threat, discrimination, and their consequences, can be avoided. While this strategy avoids some risks of identification, passing itself has a personal and a political cost.

62. The unwillingness to identify has several important implications for the question of whether gay

men and lesbians can meaningfully or effectively act on their own behalf politically. While not a panacea, social contact with gay men and lesbians is generally associated with more sympathetic policy preferences. Invisibility undermines community support.

63. Mobilization levels among gay men and lesbians is lower than other groups but is erroneously perceived to be higher. Mobilization can reasonably be understood to be an act of self-identification, so those choosing to pass have foreclosed visible political action.

64. Since not all gay men and lesbians come out, the percentage of the gay and lesbian population that is mobilized seems higher than it really is. Likewise, since those gay and lesbian citizens who choose to self-identify are those whose economic and social position in society is more secure—thereby lessening the risks of coming out—the resulting self-selection bias results in a misperception of gays and lesbians as better educated, of higher income, and otherwise "privileged." This leads the public to believe—mistakenly—that gay men and lesbians do not need of certain protections.

65. The public perception that gay men and lesbians are better educated or have higher incomes is not accurate. Statistically, gays and lesbians do not have higher levels of income and, when all gay men and lesbians are considered rather than only the self-identified, are no better educated then the public at-large. My analysis of the 2004 National Exit Polls demonstrates no difference between heterosexual voters and gay and lesbian voters on income and education.

66. Opponents characterize the efforts of gay men and lesbians to gain statutory protection as both unjustified and transgressive. Moreover, the public incorrectly perceives that gay men and lesbians are more privileged than they actually are. This misperception both mobilizes opponents and encourages complacency by potential allies.

67. In addition, the fact that sexual orientation is not directly visible may reduce the group's ability to attract allies. Potential heterosexual allies may reasonably fear being misidentified as gay or lesbian, reducing the chance that they will mobilize on behalf of gays and lesbians. The National Coalition of Anti-Violence Programs reported in 2008 that 9% of hate-crimes reported to their participating agencies on the basis of perceived sexual orientation victimize heterosexuals misidentified as gay or lesbian.

68. Finally, invisibility exacerbates the problem of geographic and social dispersion, making it more difficult for gay men and lesbians to find each other and mobilize politically.

(5) Censorship

69. In a variety of ways, gay men and lesbians are pressured to remain invisible, and in several contexts, discussion of gay people and their relationships is prohibited or regulated. Examples include the military's long-standing and only recently repealed "Don't Ask, Don't Tell" policy; legislation that prevented the National Endowment of the Arts from funding any art depicting homoeroticism; rules that have prohibited federally funded AIDS education materials from "promoting" homosexuality and requiring educators to advocate for abstinence from

extramarital sex, including same-sex couples' intimacy; and efforts in several states to forbid the mention of homosexuality in school health classes, or mandate the association of the term with descriptors suggesting that it is not acceptable. In 2011, Tennessee considered legislation banning the mention or discussion of homosexuality in primary grades, and Missouri has considered a similar bill. And, Arizona, for example, prohibits any mention that same-sex intimacy could be made "safe."

(6) Public Hostility and Prejudice

70. Gay men and lesbians face severe hostility from non-gay citizens in many parts of the country, and opinion data suggest that they are held in considerably lower regard than many groups currently receiving the protection of heightened scrutiny from the courts. Such low public regard makes it difficult for gay people to achieve significant political progress, implicitly justifies legislative and electoral actions against gay men and lesbians, and severely hampers their ability to attract donors, allies, coalition partners, or even public sympathy.

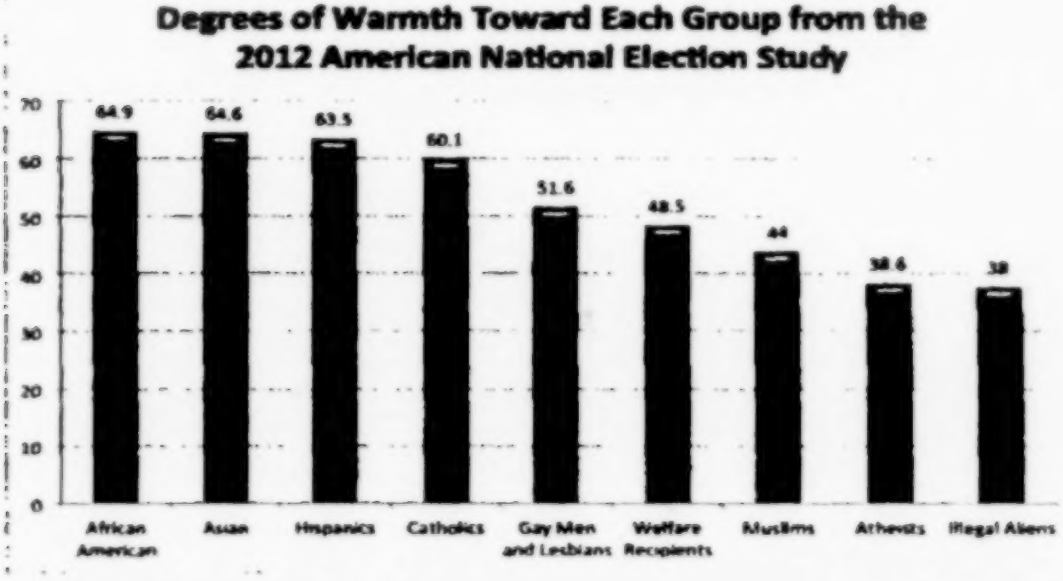
71. In each national election year, the American National Election Study (available at election studies.org or the Inter-university Consortium for Political and Social Research website) asks a representative sample of American citizens to gauge their "warmness" toward a particular group. Political scientists call this instrument a "feeling thermometer" and the scale of each ranges from 0 to 100, with 100 indicating strong warmness/fondness/positive views.

72. Examining the 2012 study, for Hispanics, approximately 35.8% of respondents rated their warmness at 50 (midpoint) or less, and the average

temperature was 63.5 (std.dev.22.5). For African Americans, only 34.4% of respondents were at or below 50, and the mean temperature was 64.9 (std.dev. 22.1). For Catholics, 42.9% were at or below the mid-point and the mean temperature was 60.1(std.dev 23.9). What is revealing about these summary numbers is their similarity. They do vary, of course, but the percentage below the mid-point all group between 34 and 43%, the means of each group is between 60 and 65 degrees on the "thermometer," and the standard deviations (a statistical score that calculates how spread apart the responses are around the mean) are between 22 and 24, indicating majority positive perception of each of these groups.

73. By contrast, gay men and lesbians fare far worse. Fully 60.6% of respondents rated gays at or below the mid-point of 50 and the mean temperature response was 51.6 (std.dev 27.8), indicating that a majority of respondents do not perceive gay men and lesbians positively. Three-fifths of the respondents rate gays and lesbians at or below the mid-point, which is almost twice that for African Americans and substantially higher than for the other groups. The mean sentiment towards gay men and lesbians is 12 points lower than for Hispanics, and 13 points lower than for African Americans. The standard deviation is also instructive, since its size (larger than for the other groups) illustrates the level of polarization in sentiment about gay men and lesbians.

74. The following chart is illustrative of this point:



75. The trend in "warmness" toward gay men and lesbians has been positive over the last several decades (as it has, in fact, for many groups in society). Notwithstanding that trend, the relative placement of gay men and lesbians vis-à-vis other "out-groups" in society suggest that public esteem remains a significant obstacle to political progress. By any estimation, the public is less fond of gay and lesbian Americans than racial and ethnic minorities and religious groups. In fact, the other groups with comparable levels of coolness include Muslims (mean=50.3), atheists (mean=41), and undocumented aliens (mean=39.3). It is revealing that 13.4% of respondents gave gay men and lesbians a score of zero, a percentage exceeded only by scores for undocumented immigrants (15.4%) and atheists (18.6%).

in favor of Proposition 8 was conceived and funded by a cooperative effort of the Roman Catholic Archbishop of San Francisco and the senior leadership of the Mormon Church. These reports were supported by documentary evidence and testimony introduced in the *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), trial in the Northern District of California, in particular evidence of interstate coordination and fundraising within and between global religious organizations. The biennial campaigns to pass Nevada's constitutional amendment prohibiting marriage for same-sex couples also received significant support from a number of churches, including the Mormon Church, which used its infrastructure to organize voters and solicit campaign donations from church members. Churches provide a well-funded, widely spread, untaxed medium in which individuals opposed to gay and lesbian policy goals can disseminate political messages and campaign materials, as well as engage in fundraising. Moreover, national religious organizations like Focus on the Family, the Traditional Values Coalition, the Family Research Council, the National Organization for Marriage and other groups provide a national network for pressuring elected officials, fundraising, message testing, media dissemination and publication, mobilization, and coordination across states and jurisdictions. This nationwide coordination, for example, explains how 13 statewide initiatives (including Ohio) concerning marriage for people in same-sex relationships appeared in a single year, 2004. Similarly, the coordination of campaigns from California to Maine illustrates the national nature of these efforts. Cahill (2007) documents the vast economic resources of these organizations and their willingness to provide them to political efforts to prevent or reverse rights, benefits,

or protections for gay men and lesbians. Gay men and lesbians lack the political resources—including voting numbers, cash, elected officials from the group, reliable allies, reach, or a favorable political opportunity structure—to counter this kind of committed, organized opposition to their interests.

86. When scientific and learned societies have concluded that there is no evidentiary or scientific bases to justify anti-gay biases or policies—whether with respect to same-sex relationships or in evaluating gay men and lesbians as parents, as healthy, productive members of society, and so forth—forces opposed to their political and social incorporation have formed splinter or shadow organizations designed to give the appearance of scientific approval to positions without broad scientific and professional support. For example, the American Psychological Association long ago removed homosexuality from their diagnostic manual as a psychologically disordered behavior, as the consensus in psychological research is that there is little or no psycho-pathology associated with homosexual identity. Nevertheless, anti-gay forces have founded the National Association of Research and Therapy for Homosexuality (NARTH), which promotes efforts to change sexual orientation even though virtually all major mental health professional organizations have adopted policy statements warning professionals and the public about these treatments. Likewise, the American Academy of Pediatrics has been publicly supportive of gay and lesbian parenting, and states on their website that "A growing body of scientific literature reveals that children who grow up with one or two gay and/or lesbian parents will develop emotionally, cognitively, socially, and sexually as well as children whose parents are heterosexual." In response, anti-gay activists have established the

"American College of Pediatricians" which, despite their name, is actually an anti-gay organization with a fraction of the Academy's membership and no scientific or professional standing. These non-mainstream organizations, with names designed to evoke a false sense of scientific authority, exist principally to discredit the scientific consensus regarding gay people, unquestionably weakening their political power.

V. Comparative Political Powerlessness

87. Gays and lesbians suffer an extreme degree of political vulnerability and powerlessness compared to most other groups in society. Even groups that have obtained the protection of heightened scrutiny from the Supreme Court possessed greater political power at the time those decisions were handed down than gays and lesbians do today. It is important to note that, at the time other groups were granted heightened scrutiny, they enjoyed a variety of constitutional and statutory protections that were not deemed adequate to the job of securing their basic liberties and did not, alone, demonstrate sufficient political power to make suspect class status unnecessary. Such is the case with lesbians and gay men. While they enjoy some statutory protections in some jurisdictions, they enjoy explicit constitutional protections in none, and face statutory and constitutional disadvantages in many.

A. Gender

88. When the Supreme Court held that sex was a quasi-suspect classification in the 1970s, they were in a far superior political position compared to that held by lesbians and gays today. Women are and were a majority of the population and, if they so choose, could

issued Executive Order 8802 prohibiting race discrimination in contracting and employment in companies doing business with the U.S. In April of 2012, President Obama declined to sign an executive order barring sexual orientation discrimination among federal contractors. Through court action and the social movement of the 1950s and 1960s, African Americans (and later Latinos) achieved a rollback of Jim Crow segregation laws and established a statutory regime of equality in employment, education, and housing. Again, this was more promise than practice, but it was a statutory circumstance superior to that of lesbians and gay men today.

91. In the 1940s and 1950s, African Americans and other racial and ethnic minorities had similar disadvantages to gays in terms of resources and social sanction, but with far greater numbers (and in some instances majorities), they have been able to claim a more meaningful share of political representation and policy responsiveness. Even before the passage of the Civil Rights Act of 1964 and Voting Rights Act of 1965, there were 5 black members of Congress and over 100 elected officials nationwide. Today, 73 people of color serve in the House of representatives. African Americans, Latinos, and Asian Americans have been elected governors and big city mayors. They form outright majorities in dozens of jurisdictions and approximately 60 House districts through the last census. Rather than serve as an impediment, most (though admittedly not all) religious institutions express support for the principle of racial equality and the church in minority communities, rather than serving as an impediment to political progress, is a locus for identification and mobilization. In terms of social support for the general principle of equal treatment under the law, racial and ethnic minorities

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* * * *

[THE COURT: And what happens if the Court grants the motion to dismiss? What happens to this litigation? Does it die along with Mr. Arthur?

MS. COONTZ: No, it does not.

THE COURT: What happens?

MS. COONTZ: Plaintiffs' merits brief was filed [19] yesterday. The defendant has the intention to respond and, obviously then, if there's any additional responsive briefing. But this case will still be very much alive and pending in this courtroom.

THE COURT: The question will be whether the Court's order becomes a permanent injunction as to these two couples?

MS. COONTZ: Correct. At this point, we're just at the temporary injunctive relief phase.

THE COURT: And, you know, the death certificate becomes an issue pursuant to the Court's order.

disenchanted with the quality and intensity of representation they appear to receive from Democratic office-holders but, in a practical sense, have no alternative. Taken together, Republican hostility and Democratic capture significantly weaken the political voice of lesbians and gay men.

(9) Moral and Political Condemnation

84. While the pluralist framework envisions shifting majorities and rotation in office, perceived Old Testament prohibitions of homosexuality serve to create, in many of America's religious communities, a permanent majority that believes same-sex intimacy is sinful and immoral, and that it should be condemned and discouraged. The General Social Survey (http://www.norc.org/GSS+Website/) regularly asks a representative sample of Americans to evaluate whether homosexual relations are "wrong." In 2008, those data show that 51.5% of Americans still report that sex between two persons of the same sex is "always wrong," while another 10.3% agree that it is "sometimes" or "almost always" wrong. Moreover, the shift in the direction of tolerance is neither large nor rapid. A decade ago, a module from the same survey showed comparable numbers, at 56% and 11.8% respectively.

(10) Powerful, Numerous, and Well-Funded Opposition

85. The moral condemnation of homosexual acts fuels and supports political opposition to protections and benefits for gays and lesbians. Campbell and Robinson (2007) found that opposition to marriages between same-sex couples united leadership and core believers across religious traditions. Similarly, the San Francisco Chronicle reported that the campaign

theoretically determine most political outcomes. While women do not have the same level of political cohesion as many other groups, so that in many cases their majority status has not proved decisive, the magnitude of their numbers is a source of potential power that politicians cannot ignore. And in fact, by the time of the recognition of sex as a quasi-suspect classification by the Court, women had achieved important victories in the political process, including the 1963 Equal Pay Act, coverage in the 1964 Civil Rights Act and its subsequent amendments, and specific statutory and constitutional protection in several states.

89. Women have a number of other characteristics that enhanced their ability to organize and act politically when compared with gays and lesbians. While sexism certainly existed (and still exists), and political activism could be costly, identity as a woman was not socially controversial, did not attract familial scorn, and did not bar one from such a large range of social institutions, though some institutions were exclusively male. Women could freely identify one another, gather, coordinate, and act largely free of fear of repressive tactics. Both political parties sought the support of women.

B. Race

90. Immediately in the wake of the Civil War, three amendments to the federal constitution established de jure legal equality for African-Americans and officially barred states from violating equal protection. Though this guarantee of equality had seldom been meaningfully enforced, it was nonetheless a de jure status superior to that now held by lesbians and gay men. In addition, as early as 1941, President Roosevelt

enjoy at least the public commitment of most institutions, elected officials and citizens, in sharp contrast to that of lesbians and gay men.

Signed under penalty of perjury this 9th day of October, 2013.

/s/ Gary M. Segura
Gary M. Segura, Ph.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 10/14/13]

Case No.

JAMES OBERGEFELL AND JOHN ARTHUR,

Plaintiffs,

vs.

JOHN KASICH, et al,

Defendants.

Judge

DECLARATION OF JAMES OBERGEFELL RE FUNERAL DIRECTOR

I, James Obergefell, under 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following is true and correct:

1. My name is James Obergefell and I am a plaintiff in the above action.

2. My husband, John Arthur, continues in hospice care. He is weaker and spends most of his time sleeping.

3. I have continued to make plans for John's imminent death, including implementing his desire to be cremated.

4. I have been thinking about next steps for some time and researching the various funeral homes that are available to help us, including the Grunn Funeral Home.

5. Today I have retained the services of the Grunn Funeral Home and licensed funeral director Robert Grunn to assist me when John dies. Specifically, he will secure the death certificate for me and he will provide cremation and related services.

6. At John's death, Mr. Grunn will complete the application for John's death certificate and submit that application to Defendant Jones.

7. I will request that, on that application, Mr. Grunn list John as married and list me as his surviving spouse.

8. I want this process to proceed smoothly and I certainly do not want Mr. Grunn to get in any trouble or face any criminal prosecution in connection with his work on our behalf.

9. I am impressed by Mr. Grunn's professionalism and by his commitment to his clients, including his gay clients.

10. I presently know and continually meet new gay couples who live in Ohio but are married in states where same-sex marriage is authorized by law.

11. I will be referring these couples to Robert Grunn as they become in need of funeral services.

Dated: 14 October 2013

/s/ James Obergefell
James Obergefell

Reg. Dist. No. 31
Primary Reg. Dist. No. 3101
Registrar's No. 2013003420

Ohio Department of Health
VITAL STATISTICS
CERTIFICATE OF DEATH
Type or print in permanent blue or black ink

State File No. 2013091926

1. Decedent's Legal Name (Include AKA's if any) (First, Middle, LAST, suffix): JOHN MONTGOMERY ARTHUR
2. Sex: Male
3. Date of Death (Month/Day/Year): October 22, 2013
4. Social Security Number: [redacted]
5a. Age (Years): 48
5b. Under 1 Year: Months / Days
5c. Under 1 day: Hours / Minutes
6. Date of Birth (Month/Day/Year): [redacted]
7. Birthplace (City and State or Foreign Country): CHICAGO, ILLINOIS
8a. Residence State: OHIO
8b. County: HAMILTON
8c. City or Town: CINCINNATI
8d. Street and Number: 1326 VINE STREET
8e. Apt. No.: 3
8f. Zipcode: 45202
8g. Inside City Limits?: Yes
9. Ever in U.S. Armed Forces?: No
10. Marital Status at Time of Death: Married
11. Surviving Spouse (If wife, give name prior to first marriage): JAMES R OBERGEFELL
12. Decedent's Education: BACHELORS DEGREE (E.G., BA, AB, BS)
13. Decedent of Hispanic Origin?: No
14. Decedent's Race: White
15. Father's Name: CHESTER A ARTHUR
16. Mother's Name (prior to first marriage): MARILYN E RAISBECK
17a. Informant's Name: JAMES R OBERGEFELL
17b. Relationship to Decedent: Spouse
17c. Mailing Address (Street and Number, City, State, Zip Code): [redacted] CINCINNATI, OHIO [redacted]
18a. Place of Death: Decedent's Home
18b. If Hospital or Nursing Home, Inpatient? (Yes/No): [redacted]
18c. City or Town, State and Zip Code: CINCINNATI, OH [redacted]
18d. County of Death: HAMILTON
19. Name of Funeral Service Licensee or Other Agent: Robert J Grunn
20. License Number (of Licensee): 007836
21. Name and Complete Address of Funeral Facility: GRUNN FUNERAL HOME, 825 MAIN ST, CINCINNATI, OH 45202
22a. Method of Disposition: Cremation
22b. Date of Disposition: 10/25/2013
23a. Place of Disposition (Name of Cemetery, Crematory, or Other Place): GREATER CINCINNATI CREMATORY
23b. Location (City/Town and State): CINCINNATI, OH
24. Signature of Person Taking Charge of Body: Camille Jones MD
24a. Name of Person Taking Charge of Body: JONES, CAMILLE
25. Date Filed: OCT 25 2013
26. Registrar No.: 3101
26a. Date Registered: OCT 25 2013
27a. Certifier (Check only one): [X] Certifying Physician — To the best of my knowledge, death occurred at the time, date, and place, and due to the cause(s) and manner stated. [ ] Coroner
27b. Time of Death: 3:15 AM
27c. Date Pronounced Dead (Month/Day/Year): October 22, 2013
27d. Were case referred to coroner?: Yes
27e. Signature of Certifier: Camille Jones MD
27f. License number: 36.062118
27g. Date Signed: 10.25.13
28. Name (Last, First, Middle) and Address of Person who Completed Cause of Death: STEGMAN, SUSAN S, 4460 RED BANK RD #100 CINCINNATI, OH 45227

29. Part I. Enter the disease, injury, or complication which caused the death. Do not enter the mode of dying, such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. Enter only one cause on each line. Type or print in permanent blue or black ink.

	Approximate Interval: Onset to Death
Immediate Cause (Final disease or condition resulting in death): a. Respiratory arrest	
Sequentially list conditions, if any, leading to the immediate cause. Enter the underlying cause (disease or injury that initiated the events resulting in death) last: b. Due to (or as a consequence of): end-stage ALS	
c. Due to (or as a consequence of):	
d. Due to (or as a consequence of):	

30. Part II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I.

31a. Was an Autopsy Performed? [ ] Yes [X] No
31b. Were Autopsy Findings Available Prior To Completion Of Cause of Death? [ ] Yes [ ] No [ ] Not Applicable
32. Did Tobacco Use Contribute to Death? [ ] Yes [ ] Undetermined [X] No [ ] Probably
33. If Female, Pregnancy Status: [ ] Not pregnant within the past year; [ ] Pregnant at time of death; [ ] Not pregnant, but pregnant within 42 days of death; [ ] Not pregnant, but pregnant 43 days to 1 year before death; [ ] Unknown if pregnant within the past year
34. Manner of Death: [X] Natural [ ] Homicide [ ] Accident [ ] Pending Investigation [ ] Suicide [ ] Could not be determined
35a. Date of Injury (Month/Day/Year):
35b. Time of Injury:
35c. Place of Injury (e.g., Decedent's home, construction site, restaurant, wooded area):
35d. Injury at Work? [ ] Yes [ ] No
35e. Location of Injury (Street and Number or Rural Route Number, City or Town, State):
36. Describe How Injury Occurred:
36a. If Transportation Injury, Specify: [ ] Driver/Operator [ ] Pedestrian [ ] Passenger [ ] Other

HHA #3A- Rev. 03/07

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CERTIFICATE OF DEATH

Reg. Dist. No. 31
Primary Reg. Dist. No. 3101
Registrar's No. 2013002853
State File No. 2013076293

1. Decedent's Legal Name (Include AKA's if any) (First, Middle, Last, Suffix): WILLIAM HERBERT IVES
2. Sex: Male
3. Date of Death (Mo/Day/Year): August 27, 2013
4. Social Security Number: [redacted]
5. Age (Years): 84
6. If Under 1 Year: Months / Days
7. If Under 24 Hours: Hours / Minutes
8. Date of Birth (Mo/Day/Year): [redacted]
9. Birthplace (City and State or Foreign Country): CATSKILL, NEW YORK
10a. Residence State: OHIO
10b. County: HAMILTON
10c. City or Town: CINCINNATI
10d. Street and Number: 126 Congress Run
10e. Apt. No.:
10f. Zipcode: 45216
10g. Inside City Limits?: Yes
11. Was Decedent Ever in U.S. Armed Forces?: No
12. Marital Status at Time of Death: Married
13. Surviving Spouse (If wife, give name prior to first marriage): DAVID MICHENER
14. Decedent's Education: BACHELORS DEGREE (E.G., BA, AB, BS)
15. Decedent of Hispanic Origin?: No
16. Decedent's Race: White
17a. Father's Name: WILLIAM HERBERT IVES
17b. Mother's Name (Prior to First Marriage): ELIZABETH JANESON
18a. Informant's Name: DAVID MICHENER
18b. Relationship to Decedent: Spouse
18c. Mailing Address (Street and Number, Apt. No., City, State, Zip Code): [redacted] CINCINNATI, OHIO [redacted]
19a. Place of Death: Hospital - Inpatient
19b. Facility Name (If not institution, give street number): UNIVERSITY HOSPITAL, INC
19c. City or Town, State and Zip Code: CINCINNATI, OH 45219
19d. County of Death: HAMILTON
20a. Attendant: Received by Coroner
20b. Certifier: Other Physician (Not Coroner, but physician certifying cause of death)
20c. Medical Record Number (If Applicable): 0841
20d. Date of Death: 8/27/13
20e. Method of Disposition: Cremation
20f. Place of Disposition (Name of Cemetery, Crematory, or Other Place): Spring Grove Cemetery and Crematory
20g. Location (City/Town and State): CINCINNATI, OH
21. Funeral Director: GWEN MOONEY FUNERAL HOME
21a. Name and Complete Address of Funeral Facility: 4389 SPRING GROVE AVE CINCINNATI, OH 45223
22a. Person Pronouncing Death: Camille Jones, MD
22b. Date Pronounced Dead: SEP 05 2013
23a. Name of Person Actually Signing Death Certificate: JONES, CAMILLE
23b. Title: 3101
23c. Date Signed: SEP 05 2013
24a. Certifier (Check only one): Certifying Physician (To the best of my knowledge, death occurred at the time, date, and place, and due to the cause(s) and manner stated.)
Coroner (On the basis of examination and/or investigation, in my opinion, death occurred at the time, date, and place, and due to the cause(s) and manner stated.)
24b. Time of Death: 0405
24c. Date Pronounced Dead (Mo/Day/Year): 08/27/13
24d. Was Medical Examiner or Coroner Contacted?: No
24e. Signature and Title of Certifier: M.D.
24f. License Number: 36.086759
24g. Date Signed: 9-4-13
25. Name (Last, First, Middle) and Address of Position with Completed Cause of Death: Blitz, Arie, University Hospitals of Cleveland, CLEVELAND, OH 44106-501
26. Part I. Enter the sequence of diseases, injuries, or complications that directly caused the death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. DO NOT abbreviate. Enter only one cause on each line. Time Interval Between Onset and Death

Immediate Cause (Final disease or condition resulting in death)	a. Cardiogenic shock	Hours
Sequentially list conditions, if any, leading to the immediate cause.	b. Due to (or as a consequence of): advanced aortic valve endocarditis	Weeks
Enter the underlying cause (disease or injury that initiated the events resulting in death)	c. Due to (or as a consequence of): enterococcus	Weeks
	d. Due to (or as a consequence of):	

Part II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I: aortic insufficiency. Cardiac surgery including aortic root repair.

27. Did Tobacco Use Contribute to Death?: Unknown
28. If Female, Pregnancy Status: Not pregnant within past year
29. Was Decedent Pregnant?: Natural
30. Was an Autopsy Performed?: No
31. Were Autopsy Findings Available Prior To Completion Of Cause of Death?: No
32. Manner of Death: Natural
33a. Date of Injury (Mo/Day/Year):
33b. Time of Injury:
33c. Place of Injury (e.g., Decedent's home, construction site, restaurant, wooded area):
33d. Injury at Work?: No
33e. Location of Injury (Street and Number or Rural Route Number, City or Town, State):
33f. Describe How Injury Occurred:
33g. If Transportation Injury, Specify: Driver/Operator

[1] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:13cv501

JAMES OBERGEFELL, ET AL.,

Plaintiffs,

v.

CAMILLE JONES, ET AL.,

Defendants.

Cincinnati, Ohio
Wednesday, October 30, 2013 1:30 p.m.

MOTION TO DISMISS

TRANSCRIPT OF PROCEEDINGS BEFORE
THE HONORABLE TIMOTHY S. BLACK, JUDGE

APPEARANCES:

For the Plaintiffs: Alphonse A. Gerhardstein, Esq.
Jacklyn Gonzales Martin, Esq.
Gerhardstein & Branch Co. LPA
432 Walnut Street, Suite 400
Cincinnati, OH 45202

MS. COONTZ: In my knowledge, it has never happened. But it is my understanding that by Ohio law, death certificates are amendable. I'm not saying that that would happen. I'm not aware of any situation in which that has happened.

But I stood before this Court back in July and made the argument that a death certificate is amendable. And because that's the position that the State has, and that's what Ohio law provides for, Mr. Arthur's death does not affect the future of this litigation.

* * * *

CAMILLE JONES, M.D.
In her official capacity as Registrar
for the City of Cincinnati Health Department,
Office of Vital Records
1525 Elm Street, 4th floor Cincinnati, OH 45202,

Defendants.

Judge

COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND DECLARATORY AND INJUNCTIVE RELIEF

I. PRELIMINARY STATEMENT

1. This civil rights case is about family and the need of children born in Ohio to have their birth certificates accurately identify their legal parents. Plaintiffs include four couples who are building their families on the basis of same-sex marriages celebrated outside of Ohio. They seek to be treated the same as married opposite-sex couples. Married opposite-sex couples have both of their names on the birth certificates of their children. Defendants do not treat married same-sex couples the same. Defendants will permit only *one* parent from each of these married same-sex plaintiff couples to be listed on the birth certificates of their children. Plaintiffs challenge this unequal treatment as unconstitutional. These same Defendants were recently ordered to recognize valid out-of state marriages between same-sex couples on death certificates. *Obergefell v. Wymyslo, 1:13-CV-501,* 2013 WL 6726688 *1 (S.D. Ohio Dec. 23, 2013). The reasoning from that case compels recognition of same-

sex marriages on birth certificates.[1] All of the Plaintiffs seek an order requiring Ohio to recognize their same-sex marriages with respect to their requests for birth certificates. These families established through same-sex marriages must granted the same status and dignity enjoyed by children and parents in families established through opposite-sex marriages.

II. JURISDICTION AND VENUE

2. Jurisdiction over the federal claims is conferred on this Court by 28 U.S.C. §1331 and §1343(3) and (4).

3. Venue is proper under 28 U.S.C. §1391(b)(1).

III. PARTIES

4. Plaintiffs Brittani Henry and Brittni ("LB") Rogers ("Henry/Rogers Family") are a married same-sex couple who reside in Cincinnati, Ohio. Brittani Henry is pregnant and is due to deliver a baby boy in Cincinnati in June, 2014. They bring this action individually.

5. Plaintiffs Georgia Nicole ("Nicole") and Pamela Yorksmith ("Yorksmith Family") are a married same-sex couple who reside in the Cincinnati area. Nicole is pregnant and is due to deliver a baby boy in Cincinnati in June, 2014. They bring this action individually.

6. Plaintiffs Kelly Noe and Kelly McCracken ("Noe/McCracken Family") are a married same-sex couple who reside in Kenton County, Kentucky. Kelly Noe is pregnant and due to deliver a child in

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[1] See also, *Kitchen v. Herbert*, 2:13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013) and *Bishop v. U.S. ex rel. Holder*, 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014) holding state laws banning same-sex marriage unconstitutional based on similar reasoning.

otherwise address all of the issues parents must resolve.

26. Denying recognition of Pam's role as parent to their child is degrading and humiliating for the family. Nicole and Pam are treated differently by Defendants than opposite-sex married parents who seek a birth certificate for their children born under the same circumstances.

27. Now Nicole is pregnant with their second child. She expects to give birth in June in Cincinnati.

28. Under Ohio law, the married opposite-sex husband of a woman who gives birth through AI is legally regarded as the natural father of the child and is listed on the birth certificate of the child born to the woman in the state of Ohio.

29. Nicole and Pam are married now and will continue to be a married couple when their second child is born, but Defendants have taken the position that they are prohibited under Ohio law from recognizing the California marriage on the birth certificate of their baby boy.

30. Without action by this Court, Defendants Jones and Wymyslo will list only one of these plaintiffs as a parent of their son on his birth certificate when he is born in June. Their son will have two parents but will have a birth certificate that only lists one of them as his parent.

C. The Noe/McCracken Family

31. Plaintiffs Kelly Noe and Kelly McCracken have been in a loving, committed same-sex relationship since 2009.

32. From the beginning of their time together they agreed that they would have children in their family.

relying on Ohio law, refuse to recognize the Henry/Rogers same-sex New York marriage.

60. Defendants Jones and Wymyslo will deny to the Yorksmith Family a birth certificate for their baby boy who is due to be born in June 2014 listing both women as the child's parents because Defendants, relying on Ohio law, refuse to recognize the Yorksmith same-sex California marriage.

61. Defendants Jones and Wymyslo will deny to the Noe/McCracken Family a birth certificate for their baby who is due to be born in June 2014 listing both women as the child's parents because Defendants, relying on Ohio law, refuse to recognize the Noe/McCracken same-sex Massachusetts marriage.

62. Defendant Wymyslo will deny the Vitale/TalmasFamily an amended birth certificate for their son born in Ohio listing both men as the child's parents because Defendants, relying on Ohio law, refuse to recognize the Vitale/Talmas same-sex New York marriage and New York adoption decree.

63. These actions by Defendants deny to Plaintiffs the same status and dignity that Defendants extend to similarly situated families with opposite-sex parents.

64. These actions also deny the full faith and credit due to the adoption decree declaring both Joe Vitale and Rob Talmas to be the parents of Adopted Child Doe.

65. By denying amended birth certificates to Adopted Child Doe and the expected children of all the other plaintiffs listing both of their parents' names, the Defendants hinder the ability of the children to receive accurate identity papers and also hinders the ability of their parents to care for and nurture their children.

Birth certificates are documents of high importance that prove parental relationship and custody and are required in many instances for parents to exercise their legal right to make decisions for their children. By denying accurate birth certificates to minor children of same-sex married parents, the Defendants violate the equal protection and substantive due process rights of those parents and those children.

66. Defendants have violated the married plaintiffs' right to remain married. "The right to remain married... is a fundamental liberty interest appropriately protected by the Due Process Clause of the United States Constitution." *Obergefell v. Wymyslo*, 1:13-CV-501, 2013 WL 6726688 *6 (S.D. Ohio Dec. 23, 2013). When one jurisdiction refuses to recognize family relationships legally established in another jurisdiction, "the differentiation demeans the couple, whose moral and sexual choices the Constitution protects ... and whose relationship the State has sought to dignify." *US. v. Windsor,* 133 S.Ct. 2675, 2694 (2013). The differential treatment "humiliates tens of thousands of children now being raised by same-sex couples," including the children that will be born to the Henry/Rogers Family, the Yorksmith Family, the Noe/McCracken Family, and Adopted Child Doe. *Id.*

67. The right of plaintiffs to remain married and have their lawful family relationships recognized in other states is a fundamental constitutional right. Its violation constitutes irreparable harm as a matter of law.

68. Defendants have violated Plaintiffs' right to travel. Plaintiffs need accurate amended birth

Cincinnati, Ohio in June, 2014. They bring this action individually.

7. Plaintiff Adopted Child Doe is an adopted minor child of Plaintiffs Joseph J. Vitale and Robert Talmas. Doe was born in Ohio and resides with his adoptive parents in New York City, New York. He brings this action individually through his adoptive parents.

8. Plaintiffs Joseph ("Joe") Vitale and Robert ("Rob") Talmas ("Vitale/Talmas Family") are a married same-sex couple who reside in New York City, New York. They bring this action individually and as the legally adoptive parents of Adopted Child Doe.

9. Plaintiff Adoption S.T.A.R., Inc. ("Adoption S.T.A.R.") is a non-profit child placing agency licensed in Ohio. Plaintiff Adoption S.T.A.R. brings this action on behalf of its clients who seek to complete adoptions from states such as New York where same-sex married couples are both designated as parents but because the child subject to the adoption was born in Ohio, their clients have been forced to record only one of the parent's names on the amended birth certificates issued by Defendants rather than the names of both adoptive parents.

10. Defendant Theodore E. Wymyslo, M.D. is the Director of the Ohio Department of Health. In that capacity he is responsible for overseeing the administration of all statutes and regulations that relate to the State of Ohio's system for recording vital statistics, including but not limited to the issuance of birth certificates. Defendant Wymyslo is sued in his official capacity for injunctive relief only.

11. Defendant Dr. Camille Jones, Local Registrar, Cincinnati Health Department Office of Vital Records, is responsible for filing birth certificates and ensuring

that the personal information on the birth certificate is accurate. Defendant Jones is sued in her official capacity.

IV. FACTS

A. Henry/Rogers Family

12. Plaintiffs Brittani Henry and LB Rogers met in 2008. They have been in a loving, committed same-sex relationship since that time.

13. After the decision was rendered in *Obergefell v. Wymyslo,* the couple formalized their commitment through marriage. On January 17, 2014, they were married in the state of New York.

14. Brittani Henry has worked in the health care field and LB Rogers has worked in the package service industry. Having established a home together and enjoying the loving support of their families, the couple decided that they wanted to have children.

15. Brittani Henry became pregnant through artificial insemination ("AI"). The sperm donor is anonymous.

16. Brittani Henry is currently 23 weeks pregnant. She expects to deliver a baby boy in June, 2014.

17. LB Rogers consented to and was a full participant in the decision to build their family using AI. From the beginning they intended to raise this child as their own, together.

18. Under Ohio law, the married opposite-sex husband of a woman who gives birth through AI is legally regarded as the natural father of the child and is listed on the birth certificate of the child born to the woman in the state of Ohio.

19. Brittani Henry and LB Rogers are married now and will continue to be a married couple when their child is born, but Defendants have taken the position that they are prohibited under Ohio law from recognizing the New York marriage on the birth certificate of their baby boy.

20. Without action by this Court, Defendants Jones and Wymyslo will list only one of these plaintiffs as a parent of their son on his birth certificate when he is born in June. Their son will have two parents but will have a birth certificate that only lists one of them as his parent.

B. Yorksmith Family

21. Nicole and Pam Yorksmith met and fell in love in 2006. They were married in California on October 14, 2008.

22. The Yorksmith family already includes a three year old son born in 2010 in Cincinnati. He was conceived through AI. The sperm donor is anonymous.

23. Nicole is their son's birth mother but Pam was fully engaged in the AI process, pregnancy and birth. They share and love their ongoing role as parents.

24. Only Nicole is listed on their son's birth certificate because Defendants will not list the names of both same-sex married parents on the birth certificates of their children conceived through AI.

25. Failing to have both parents listed on their son's birth certificate has caused the Yorksmith Family great concern. They have created documents attempting to ensure that Pam will be recognized with authority to approve medical care, deal with child care workers and teachers, travel alone with their son and

33. They were married in the state of Massachusetts in 2011.

34. Kelly Noe became pregnant through AI. The sperm donor is anonymous.

35. Kelly Noe expects to deliver a baby in a Cincinnati, Ohio hospital in June, 2014.

36. Kelly McCracken consented to and was a full participant in the decision to build their family using AI. From the beginning they intended to raise this child as their own, together.

37. Under Ohio law, the married opposite-sex husband of a woman who gives birth through AI is legally regarded as the natural father of the child and is listed on the birth certificate of the child born to the woman in the state of Ohio.

38. Kelly Noe and Kelly McCracken are married now and will continue to be a married couple when their child is born, but Defendants have taken the position that they are prohibited under Ohio law from recognizing the Massachusetts marriage on the birth certificate of their baby.

39. Without action by this Court Defendants Jones and Wymyslo will list only one of these plaintiffs as a parent of their child on his/her birth certificate when the child is born. Their child will have two parents but will have a birth certificate that only lists one of them as a parent of the child.

D. Vitale/Talmas Family

40. Plaintiffs Joseph J. Vitale and Robert Talmas (Joe and Rob) met in 1997. They live and work as executives in corporations in New York City. They love to travel, enjoy nature, and love to spend time with their extended families.

41. Joe and Rob married in New York on September 20, 2011, and commenced work with Adoption S.T.A.R. to start a family through adoption.

42. Adopted Child Doe was born in Ohio in 2013. Custody was transferred to Plaintiff Adoption S.T.A.R. shortly after birth. Joe and Rob immediately assumed physical custody and welcomed their young boy into their home.

43. On January 17, 2014, an Order of Adoption of Adopted Child Doe was issued by the Surrogate's Court of the State of New York, County of New York, naming both Joe and Rob as parents. Thus, Joe and Rob are full legal parents of Adopted Child Doe.

44. The Plaintiffs are applying to the Ohio Department of Health, Office of Vital Statistics, for an amended birth certificate listing Adopted Child Doe's adoptive name and the names of Joe and Rob as his adoptive parents.

45. Based on the experience of Plaintiff Adoption S.T.A.R.with other clients and their direct communications with the Defendant Wymyslo's staff at the Ohio Department of Health, Plaintiffs Adopted Child Doe and his parents, Joe and Rob will be denied a birth certificate that lists both Joe and Rob as parents.

46. Opposite-sex couples married in New York who secure an order of adoption from a New York court regarding a child born in Ohio routinely have the child's adoptive name placed on his or her birth certificate along with the names of both the man and the woman as the parents of the adoptive child. Plaintiffs Joe and Rob will be denied treatment equal to that of similarly situated opposite-sex couples and Adopted Child Doe will be denied treatment equal to

that of similarly-situated children adopted by opposite-sex couples.

47. Without action by this Court, Defendant Wymyslo will allow only one of these plaintiffs to be listed as the parent on the birth certificate of Adopted Child Doe. Joe and Rob refuse to be forced to pick just one of them to be recognized as their son's parent and refuse to allow this vitally important document to misrepresent the status of their family. They do not wish to expose their son to the life-long risks and harms attendant to having only one of his parents on his birth certificate. They seek relief through this action instead.

E. Adoption S.T.A.R.

48. As a result of Ohio's practice of not amending birth certificates for the adopted children of married same-sex parents, Adoption S.T.A.R. has been forced to change its placement agreements to inform potential same-sex adoptive parents that they will not be able to receive an accurate amended birth certificate for adopted children born in Ohio. Adoption S.T.A.R. has expended unbudgeted time and money to change its agreements and advise same-sex adoptive parents of Ohio's discriminatory practice, and it has devoted extra time and money to cases like this involving same-sex married couples who adopt children born in Ohio through court actions in other states. The process to seek an accurate birth certificate for Adopted Child Doe—including necessary participation in this lawsuit—is also expected to be a protracted effort that will cause the expenditure of extra time and money.

49. Adoption S.T.A.R. has served same-sex married couples in previous adoption cases and currently is serving other same-sex married couples in various

stages of completing the adoption process in other states for children born in Ohio. Adoption S.T.A.R. will serve more same-sex married couples in this capacity in the future. Unless these couples are able to secure amended birth certificates from Defendant Wymyslo accurately listing both same-sex married persons as the legal parents of their adopted children, they will have clients unable to secure equal rights and full faith and credit for their adoption decrees. This will impose a significant burden on the agency' sability to provide adequate and equitable adoption services to its clients resulting in incomplete adoptions and loss of revenue, frustrating the very purpose of providing adoption services to its clients.

F. The Marriages of the Henry/Rogers, Yorksmith, Noe/McCracken, and Vitale/ Talmas Families are Not Recognized in Ohio

50. The Henry/Rogers marriage is legally recognized in New York where it was celebrated.

51. The Yorksmith marriage is legally recognized in California where it was celebrated.

52. The Noe/McCracken marriage is legally recognized in Massachusetts where it was celebrated.

53. The Vitale/Talmas marriage is legally recognized in New York where it was celebrated.

54. The marriages of these plaintiffs are also recognized by the federal government by virtue of the decision in *United States v. Windsor,* 133 S.Ct. 2675 (June 26, 2013).

55. The marriages of the plaintiffs are not recognized under current Ohio law.

56. Ohio statutory law prohibits legal recognition of the same-sex marriages of the plaintiff couples. Ohio Rev. Code. § 3101.01(C)(2) states, "Any marriage entered into by persons of the same-sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state."

57. The Ohio Constitution also prohibits recognition of the same-sex marriages of the couples. OH Const. Art. XV, §11 states, "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

58. Unless this Court acts to enjoin these provisions of Ohio law as unconstitutional as applied to these married same-sex plaintiffs they will not be able to secure birth certificates for their children on an equal basis as similarly-situated married opposite-sex parents. Further, without action by this Court, the Vitale/Talmas Family and other families served by Adoption S.T.A.R. will continue to be unlawfully prevented from receiving full faith and credit for their out-of-state adoption decrees as they seek accurate Ohio birth certificates.

G. Need for Injunction

59. Defendants Jones and Wymyslo will deny to the Henry/Rogers Family a birth certificate for their baby boy who is due to be born in June 2014 listing both women as the child's parents because Defendants,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed 2/10/14]

Case No. 1:14-cv-129

BRITTANI HENRY AND BRITTNI ROGERS;
GEORGIA NICOLE YORKSMITH AND PAMELA YORKSMITH;
KELLY NOE AND KELLY MCCRACKEN
C/O GERHARDSTEIN & BRANCH, LPA
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202

and

ADOPTED CHILD DOE
JOSEPH J. VITALE AND ROBERT TALMAS
C/O GERHARDSTEIN & BRANCH, LPA
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202

and

ADOPTION S.T.A.R., INC.
433 W. Loveland Ave. 1st Floor
Loveland, OH 45140

Plaintiffs,

v.

THEODORE E. WYMYSLO, M.D.
246 N. High Street
Columbus, OH 43215
In his official capacity as Director of the Ohio Department of Health

and

same-sex married couples that accurately list both parents. Nor is there any legitimate basis to deny full faith and credit to adoption decrees declaring two adults of the same sex to be the parents of their adopted child. The only reason Defendants refuse to issue birth certificates to these couples listing them as parents to their children is that they are engaged in same-sex marriages. Denying equal government services and privileges to persons because they are married to persons of the same sex is not a legitimate governmental interest.

75. On information and belief, prior to Governor Kasich, Attorney General DeWine, and Defendant Wymyslo taking office in January, 2011, the Ohio Department of Health was providing same-sex married couple such as plaintiffs Joe and Rob with birth certificates for their adopted children consistent with that requested in this complaint. There is no legitimate state interest to support this change in policy.

76. There is no adequate remedy at law. The Henry/Rogers Family, the Yorksmith Family, the Noe/McCracken Family, the Vitale/Talmas Family, and the families served by Adoption S.T.A.R. are all suffering irreparable harm. There is no harm to the state or local governments by granting a declaratory judgment and an injunction prohibiting Defendants' enforcement of the challenged statute and Ohio constitutional amendment as applied to the plaintiffs with respect to the issuance of birth certificates. The public interest is clearly served by this Court acting to order recognition of the true nature of the plaintiff families consistent with the manner in which Ohio treats similarly-situated families with opposite-sex parents as applied to the issuance of birth certificates.

certificates to apply for passports.[2] Federal law requires that passport applications include full names of the applicant's parents.[3] Without a birth certificate for their child that accurately records the names of both adoptive parents and the adoptive names of Adopted Child Doe, the Vitale/Talmas Family is unable to secure a passport for their son. Plaintiffs Joe and Rob routinely engage in international and domestic travel, and they have an international trip planned with their son in May 2014 that is not in their power to reschedule. The constitutional right of all plaintiff families to travel is being violated by Defendants' refusal to issue amended birth certificates that properly list both parents.

69. A birth certificate will be required for Adopted Child Doe and for the children to be born to the Henry/Rogers Family, the Yorksmith Family, and the Noe/McCracken Family to register for public school and to obtain a state identification card or driver's license.

70. Birth certificates are widely used as primary evidence of identity. They are weighty documents of extreme importance. When the authenticity or accuracy of a birth certificate is questioned, huge controversies can result.[4] Children are harmed when

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[2] U.S. Department of State, Minors under Age 16, http://travel.state.gov/passport/getiminors/minors_834.html (last visited Jan. 3 2014).

[3] U.S. Department of State, New Requirements for U.S. Birth Certificates, http://travel.state.gov/passport/passport_5401.html (last visited Jan. 3, 2014).

[4] The controversy over President Barack Obama's birth certificate, which began prior to his presidency, continues today. *See* Soumya Karlamangla, Los Angeles Times, Crash fuels conspiracists, Dec. 13, 2013,

their parents are not recognized on birth certificates because it is the official document establishing a person's identity and their family.

71. Plaintiffs have a high likelihood of success on the merits. Many of the constitutional issues raised in this case were decided in favor of the same-sex married couples in *Obergefell* and *Windsor*. *Obergefell* is particularly relevant. There, Defendants were required by the United States District Court for the Southern District of Ohio to record death certificates reflecting same-sex marriages—listing the decedents as "married" and their same-sex spouses as their "surviving spouses." Their refusal to do so violated the constitutional guarantees of equal protection and substantive due process. Defendants' constitutional violations in this case are nearly identical to the violations identified and enjoined in *Obergefell*.

72. The decision in *Obergefell* firmly establishes that same-sex married couples are equal to opposite-sex married couples as parents and that children raised in families headed by same-sex married parents are just as well-adjusted and healthy as children raised in families headed by opposite-sex married parents. *Obergefell v. Wymyslo*, 1:13-CV-501, 2013 WL 6726688 *20 (S.D. Ohio Dec. 23, 2013).

73. This Court should take judicial notice of the factual record in the *Obergefell* case, including the expert declarations filed by the parties.

74. The public interest and the balance of equities favor the plaintiffs as there is no legitimate state interest in denying birth certificates to children of

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http://articles.latimes.com/2013/dec/13/nation/la-na-hawaii-plane-crash-20131213 (last visited Jan. 3, 2014).

The public interest is also clearly served by according full faith and credit to the duly issued judicial decrees of sister states. Only prompt action by this Federal Court ordering declaratory and injunctive relief will serve the public interest.

V. FIRST CLAIM FOR RELIEF

42 U.S.C. §1983—United States Constitution

77. Defendants, acting under color of law, have violated rights secured to plaintiffs by the First and Fourteenth Amendments to the United States Constitution including the right of association, the right to due process of law, and the right to equal protection under the law. Specifically, Defendants have failed and will fail to issue birth certificates listing the adult plaintiffs as the legal parents of their children based solely on the fact that they are in a same-sex marriage. This action denies rights owed to both the adult and the child plaintiffs.

VI. SECOND CLAIM FOR RELIEF

U.S.C. §1983—Full Faith and Credit

78. Defendants, acting under color of law, have violated rights secured to plaintiffs Adopted Child Doe, Joseph J. Vitale, Robert Talmas, and clients of Adoption S.T.A.R. by the Full Faith and Credit Clause, Article W, Section 1 of the United States Constitution. Specifically, Defendants have refused to give full faith and credit to a final order of adoption issued by a court of competent jurisdiction in a sister state.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

A. Issue a declaratory judgment that the statutory and Ohio Constitutional provisions at issue in this

case violate the constitutional rights of these families with same-sex parents married in jurisdictions that authorize same-sex marriage who would be entitled to have both parents on a child's birth certificate but for the fact that the parents are of the same sex. Specifically, this court should declare that the Henry/Rogers Family is entitled to a birth certificate for their child at birth that lists both Brittany Henry and Brittni Rogers as the parents of that child. Also, the Yorksmith Family is entitled to a birth certificate for their child at birth that lists both Georgia Nicole Yorksmith and Pamela Yorksmith as parents of that child. Also, the Noe/McCracken Family is entitled to a birth certificate for their child at birth that lists both Kelly Noe and Kelly McCracken as parents of that child. Finally, the Vitale/Talmas Family is entitled to a birth certificate for Adopted Child Doe listing both Joseph Vitale and Robert Talmas as his legal parents

B. Issue a declaratory judgment that the statutory and Ohio Constitutional provisions at issue in this case violate the constitutional rights of those same-sex couples married in jurisdictions that authorize same-sex marriage who become clients of Plaintiff Adoption S.T.A.R. who secure adoption orders for children born in Ohio and who seek birth certificates that record both persons in the marriage as the legal parents.

C. Issue a preliminary and permanent injunction against Defendants and all those acting in concert requiring that they issue to the Henry/Rogers Family a birth certificate for their child at birth that lists both Brittany Henry and Brittni Rogers as the parents of that child; and that they issue to the Yorksmith Family a birth certificate for their child at birth that lists both Georgia Nicole Yorksmith and Pamela Yorksmith as parents of that child; and that they issue to the

Noe/McCracken Family a birth certificate for their child at birth that lists both Kelly Noe and Kelly McCracken as parents of that child; and that they issue to the Vitale/Talmas Family a birth certificate listing both Joseph Vitale and Robert Talmas as the legal parents of Adoptive Child Doe. Said injunction shall include a requirement that Defendant Wymyslo and Jones issue instructions to local registrars and Department staff who assist with the completing of Ohio birth certificates explaining their duties under the orders of this Court, and said injunction shall include a requirement that Defendants Wymyslo and Jones issue directives to adoption agencies and hospitals and all those who have the responsibility for assisting with the completing of Ohio birth certificates explaining their duties under the orders of this Court;

D. Award to Plaintiffs reasonable costs, expenses, and attorney fees;

E. Award such other and further relief as this Court shall deem just and reasonable.

Respectfully submitted,

LISA T. MEEKS #0062074
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Phone: 513.639.7000
Fax: 513.639.7011
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ELLEN ESSIG
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Cincinnati, OH 45202
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: 2/10/14]

Case No. 1:14-cv-129

BRITTANI HENRY, ET AL.,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, M.D., ET AL.,

Defendants.

Judge Timothy S. Black

DECLARATION OF BRITTNI ROGERS

I, Brittni ("LB") Rogers, under 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following is true and correct:

1. My name is Brittni Rogers and I am a plaintiff in the above action. I have read the complaint filed in this action and I can verify that all of the facts pertaining to me and my family are true. I submit this declaration in support of our request for a preliminary injunction.

2. I am 24-years-old. I grew up in Columbus, Ohio. I work in the package service industry, and I plan to attend Xavier University to pursue my Bachelor's degree this summer.

3. I met Brittani Henry in 2008. We have been in a loving, committed relationship since that time. I moved to Cincinnati to be with Brittani in 2010.

4. Brittani is from Cincinnati. Her family, including her parents and five younger brothers, all live nearby. Brittani and I are proud to make our home in Cincinnati, and we plan to stay here.

5. I proposed to Brittani on Fountain Square in downtown Cincinnati at midnight on New Year's Eve in 2012. She accepted making that one of the happiest days of our lives.

6. On January 17, 2014, we went to New York City and sealed our commitment to each other in a courthouse wedding. My close friend served as our witness.

7. Brittani and I have each always wanted to have children, and have been talking seriously about starting a family for years.

8. My wife, Brittani, is currently 23 weeks pregnant. We expect our baby boy to be born in June, 2014. Brittani became pregnant through artificial insemination. The sperm donor is anonymous.

9. Although our son's due date is in June, we recognize that he could come anytime and we are excited about planning for our baby's arrival, His nursery is ready and our family and friends are already buying too many gifts.

10. When our son is born, Brittani and I want me to be listed as the second parent on the birth certificate. This is most important for our son. He has two parents and we want him to know that from his first moments on earth we were both recognized as his parents here in Ohio. Listing both of us as

ee@kgnlaw.com
[pro hac vice motion pending]
Attorneys for Plaintiffs'

/s/ Alphonse A. Gerhardstein
Alphonse A. Gerhardstein # 003205
Trial Attorney for Plaintiffs

JENNIFER L. BRANCH #0038893
JACKLYN GONZALES MARTIN #0090242
GERHARDSTEIN & BRANCH CO. LPA
432 Walnut Street, Suite 400
Cincinnati, Ohio 45202
Phone: 513.621.9100
Fax: 513. 345-5543

parents provides our whole family with emotional security, in knowing we are valued and recognized as an Ohio family. It will also provide tangible benefits to us.

11. For example, if something should happen to my wife such that she could no longer take care of our child, there is no guarantee that I will be granted custody. If I should die without a will, I would want there to be no question that my child could inherit from me or that my parents would be his legal grandparents.

12. I consented to and was a full participant in the process of artificial insemination. From the beginning we intended to raise this child as their own, together. I anxiously await becoming a mother. I am our child's second parent. I am married to his biological mother and will still be married to her at the time of his birth in a few short weeks. I will be this child's loving parent for the rest of my life.

13. Brittani and I live as a married couple. We will provide a secure and happy home for our child. Ohio's denial of the true nature of our family demeans and harms all three of us.

Dated: 2/8/14

/s/ Brittni Rogers
Brittni Rogers

X-2014-2

THE CITY OF NEW YORK
OFFICE OF THE CITY CLERK
MARRIAGE LICENSE BUREAU

License Number
X-2014-342

Certificate of Marriage Registration

This Is To Certify That BRITANI N HENRY New Surname HENRY-ROGERS

residing at 1314 Franklin Avenue Apartment # 2, Cincinnati, OH 45237, United States

born on 09/17/1988 at Cincinnati Ohio United States

and BRITTNY L ROGERS

residing at 1314 Franklin Avenue Apartment # 2, Cincinnati, OH 45237, United States

born on 01/12/1990 at Columbus Ohio United States

Were Married

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WHO
EASTERN DIVISION

[Filed: 2/10/14]

Case No. 1:14-cv-129

RRITTANI HENRY, ET AL.,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, M.D., ET AL.,

Defendants.

Judge Timothy S. Black

DECLARATION OF GEORGIA NICOLE YORKSMITH

I, Georgia Nicole Yorksmith, under 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following is true and correct:

1. My name is Georgia Nicole Yorksmith and I am a plaintiff in the above action. I have read the complaint filed in this action and I can verify that all of the facts are true. I submit this declaration in support of our request for a preliminary injunction.
2. I am 34 years-old. I live in Florence, Kentucky, with my wife, Pamela Yorksmith.
3. Pam and I have been in a committed relationship since October, 2006.

4. We both wanted children. From the beginning of our relationship, Pam and I discussed adding children to our family.

5. Pam and I married on October 14, 2008, in California.

6. On November 19, 2009, the Hamilton County, Ohio, Probate Court granted our petition to legally change our last names to Yorksmith, a combination of my last name (Smith) and Pam's last name (York). We felt it was important for us to share a last name so that when we had children, our family would have the same last name.

7. On October 18, 2010, we welcomed our first son, G. Yorksmith. He was born in Cincinnati, Ohio. I am the birth mother. He was conceived through artificial insemination with sperm from an anonymous donor.

8. Although Pam was equally involved in the fertility process, pregnancy and birth, only my name appears on the birth certificate.

9. When our son needed a passport, I was the only one allowed to apply because my name was the only name on the birth certificate.

10. Although Pam is an equal in parenting our son, I have had to draft medical powers of attorney in the event of an emergency and Pam was the parent available to deal with the emergency. I've drafted general powers of attorney so that Pant can deal with teachers and daycare workers.

11. I am concerned that these documents could be rejected and our son's safety jeopardized if Pam is not acknowledged as an equal parent. I would not

have these worries if her name could have been listed on his birth certificate.

12. I am pregnant with our second son. O. Yorksmith is scheduled to arrive on June 25, 2014. He was conceived, through artificial insemination with sperm provided by an anonymous donor. He will be born at Christ Hospital in Cincinnati, Ohio.

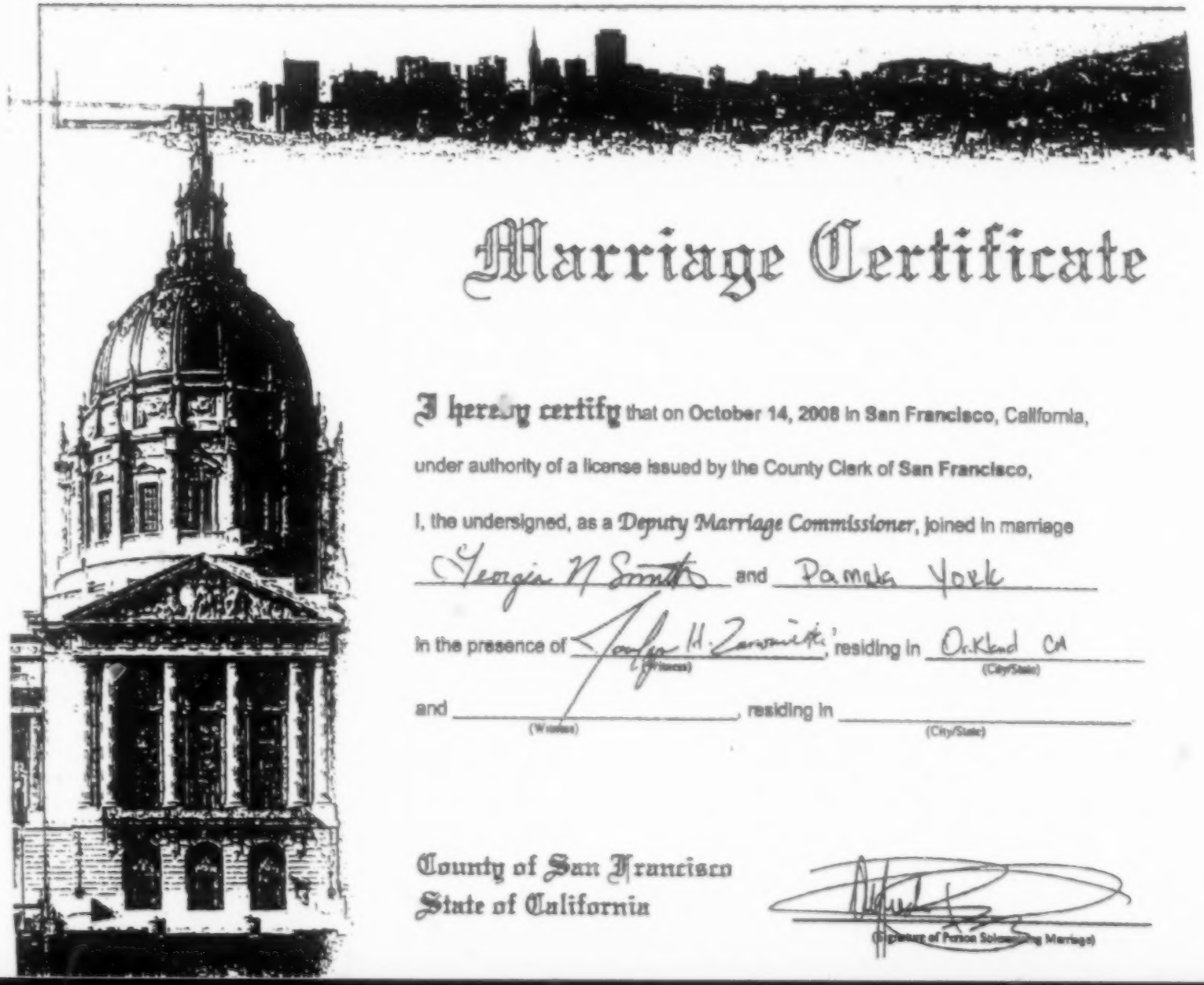
13. Pam was equally involved in our second son's fertility process and is a loving spouse during this pregnancy. She will equally co-parent him, just as she equally co-parents his big brother.

14. It denigrates my family to refuse to put Pam's name on her son's birth certificate.

15. Pam and I live as a married couple. We provide a secure and happy home for our son and look forward to the arrival of our second son. Ohio's denial of the true nature of our family demeans and harms all of us.

Dated: 2/8/2014

/s/ Georgia Nicole Yorksmith
Georgia Nicole Yorksmith



Marriage Certificate

I hereby certify that on October 14, 2008 in San Francisco, California,

under authority of a license issued by the County Clerk of San Francisco,

I, the undersigned, as a *Deputy Marriage Commissioner*, joined in marriage

Georgia N Smith and Pamela York

in the presence of [illegible], residing in Oakland CA
(Witness) (City/State)

and _____, residing in _____
(Witness) (City/State)

County of San Francisco
State of California

[signature]
(Signature of Person Solemnizing Marriage)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: 2/10/14]

Case No. 1:14-cv-129

BRITTANI HENRY, ET AL.,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, M.D., ET AL.,

Defendants.

Judge Timothy S. Black

DECLARATION OF KELLY NOE

I, Kelly Noe, under 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following is true and correct:

1. My name is Kelly Noe and I am a plaintiff in the above action. I have read the complaint filed in this action and I can verify that all of the facts are true. I submit this declaration in support of our request for a preliminary injunction.

2. I am 31-years-old. I live in Kenton County, Kentucky, with my wife, Kelly McCracken.

3. Kelly McCracken and I have been in a committed relationship since 2009.

4. We both wanted children. From the beginning of our relationship, we discussed adding children to our family.

5. We married in Massachusetts in 2011.

6. In September, 2013, I became pregnant with our first child. We expect to welcome our son or daughter in June, 2014. We plan to hyphenate our last names for our child's last name. Our child was conceived through artificial insemination with sperm from an anonymous donor.

7. Kelly McCracken has been equally involved in the fertility process and pregnancy. She will be at our child's birth and if all goes as planned, she will cut the umbilical cord. She will be this child's parent in every sense.

8. After the birth of our child, we will apply for an Ohio birth certificate through the Cincinnati Health department, Office of Vital Records. Only my name, however, will be on the birth certificate.

9. It denigrates my family to refuse to put Kelly McCracken's name on her child's birth certificate.

10. Ms. McCracken and I live as a married couple. We plan to provide a secure and happy home for our child and look forward to our child's arrival. Ohio's denial of the true nature of our family demeans and harms all of us.

Dated: 2/8/2014

/s/ Kelly Noe
Kelly Noe

Town of Provincetown
Office of the Town Clerk

Town Hall, 260 Commercial Street
Provincetown, Massachusetts 02657
Facsimile (508) 487-9560
Telephone (508) 487-7013

The Commonwealth of Massachusetts
DEPARTMENT OF PUBLIC HEALTH
REGISTRY OF VITAL RECORDS AND STATISTICS

CERTIFICATE OF MARRIAGE

(State file number) Provincetown
(City or town making return) Registered No. 51

1 Place of Marriage — City or Town: Provincetown (Do not enter name of village or section of city or town)
2 Date of Marriage: May 27, 2011 (Month) (Day) (Year) Intention No. 2011-057

3 FULL NAME PARTY A: Kelly Marie Noe	11 FULL NAME PARTY B: Kelly Ann McCracken
3A SURNAME AFTER MARRIAGE: Noe	11A SURNAME AFTER MARRIAGE: McCracken
4 DATE OF BIRTH: December 10, 1982	5 OCCUPATION: STNA
12 DATE OF BIRTH: June 2, 1982	13 OCCUPATION: Musician
6 RESIDENCE NO. & ST.: 345 Belvedere Avenue SE; CITY/TOWN: Warren; ST.: OH; ZIP CODE: 44483	14 RESIDENCE NO. & ST.: 345 Belvedere Avenue SE; CITY/TOWN: Warren; ST.: OH; ZIP CODE: 44483
7 NUMBER OF MARRIAGE (1st, 2nd, 3rd, etc.): 1st	7A WIDOWED OR DIVORCED: - - -
15 NUMBER OF MARRIAGE (1st, 2nd, 3rd, etc.): 1st	15A WIDOWED OR DIVORCED: - - -
8 BIRTHPLACE: Corbin (City or town) Kentucky (State or country)	16 BIRTHPLACE: Warren (City or town) Ohio (State or country)
9 NAME OF MOTHER/PARENT: Patricia Noe/Root	17 NAME OF MOTHER/PARENT: Pamela Marie McCracken/Politsky
10 NAME OF FATHER/PARENT: John Elmer Noe	18 NAME OF FATHER/PARENT: Lawrence Michael McCracken

19 THE INTENTION OF MARRIAGE by the above-mentioned persons was duly entered by me in the records of the Community of Provincetown according to law, this 23 day of May 20 11

☐ COURT WAIVER ☐ AGE ORDER Issued May 26, 2011 (Month) (Day) (Year) (Name of Community) by _____ (City or Town Clerk or Registrar)

20 I HEREBY CERTIFY that I solemnized the marriage of the above-named persons at No. 1 Commercial St. (If marriage was solemnized in a church, give its NAME instead of street and number) Provincetown (Name of city or town) on May (Month) 27 (Day) 2011 (Year)

Signature: Susan F. Brand
Susan F. Brand (Print or type name)
Justice of the Peace (Member of the Clergy, Priest, Rabbi, Imam, or Justice of the Peace, etc.)

Address: 7 Arlington St, No. 22, Cambridge MA 02140

21 Certificate recorded by city or town clerk: June 6, 2011 (Month) (Day) (Year) Doug Johnstone CLERK OR REGISTRAR

22 PARTY A SEX: ☐MALE ☒FEMALE

23 PARTY B SEX: ☐MALE ☒FEMALE

A TRUE COPY ATTEST
Doug Johnstone
TOWN CLERK, PROVINCETOWN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: 2/10/14]

Case No. 1:14-cv-129

BRITTANI HENRY, ET AL.,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, M.D., ET AL.,

Defendants.

Judge Timothy S. Black

DECLARATION OF JOSEPH VITALE

I, Joseph Vitale, under 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following is true and correct:

1. My name is Joseph Vitale and I am a plaintiff in the above action. I have read the complaint filed in this action and I can verify that all of the facts are true. I submit this declaration in support of our request for a preliminary injunction.

2. I am 45-years-old. I live in New York City with my husband, Robert Talmas.

3. I met Rob on September 20, 1997. We have been in a happy and committed relationship since that time.

4. We own our home in Manhattan close to parks and playgrounds. We also have a weekend home close to the beach in Rhode Island.

5. We both have large, supportive families who are very involved in our lives. Rob is adopted, which makes it particularly important to us that our son's adoption is done correctly and there is no question for him as to his identity and who his parents are.

6. I knew very early on in our relationship that we were incredibly lucky to have found one another for many reasons, one of which was their mutual desire to start our own family someday.

7. Rob and I were married in New York on September 20, 2011.

8. Rob and I both have degrees in business administration. I work in the insurance field and Rob works in the human resources field.

9. We happily adopted our first child, a newborn son, in 2013. Adoption S.T.A.R., Inc. was the agency we used, and we were able to see our dream of becoming parents come true.

10. Rob and I were both at the hospital the day our son was born, and we slept in the hospital with our newborn in the room until he was discharged. *See* Photo, attached as Exhibit A.

11. Our son was born in the state of Ohio.

12. Rob and I are in the process of securing a birth certificate for our son, whose adoption was finalized in New York on January 17, 2014. Upon discussing the birth certificate issue with Adoption S.T.A.R., Inc., we discovered an alarming fact. Ohio does not recognize gay marriage so therefore Ohio will not place both our names on our son's birth

certificate. We could indeed receive a birth certificate, but with only one of us listed as his parent! We were dismayed by this news.

13. Why should our Ohio-born son feel any 'less than' as a result of having only one of our names listed on his birth certificate, as compared to New York-born adopted children, who have birth certificates with both of their adoptive parents' names on them? How would we choose which parent should be listed on the birth certificate? What message does that give our son? Plus, it would make things more complicated for us if the non-listed parent tried to present the birth certificate in an effort to get a social security card, a passport, registration for school, and so much more.

14. We are legally married under New York law. But in Ohio our marriage means nothing. Ohio does not recognize our marriage.

15. Rob and I enjoy traveling, and we have been to many foreign countries together. We look forward to obtaining a passport for our son so we can provide him the opportunity to see the world.

16. For example, one of my life-long family friend's wedding is scheduled for May 9, 2014, in the Dominican Republic. Our son will be the ring-bearer in the ceremony. However, without a birth certificate, we will be unable to obtain a passport for our son and we will not be able to attend.

17. Rob and I live as a married couple. We provide a secure and happy home for our beloved son—we have changed his diapers, sung him to sleep, and smothered him in kisses. Like any married couple, we have assumed parenting responsibilities jointly—taking turns waking up in the middle of

the night; one picking up toys while the other runs a bath; and jointly earning the income that pays for the things he needs. Ohio's denial of the true nature of our family demeans and harms all three of us.

Dated: February 7, 2014

/s/ Joseph Vitale
Joseph Vitale

M-2011-2

THE CITY OF NEW YORK
OFFICE OF THE CITY CLERK
MARRIAGE LICENSE BUREAU

License Number
M-2011-22280

Certificate of Marriage Registration

This Is To Certify That ROBERT JOEL TALMAS

residing at 205 3rd Avenue Apartment # 3B, New York, NY 10003, United States

born on 06/04/1970 at Long Beach New York United States

and JOSEPH J VITALE

residing at 205 3rd Avenue Apartment # 3B, New York, NY 10003, United States

born on 07/23/1980 at Bay Shore New York United States

Were Married

on 09/20/2011
By JAMES MITCHELL

at The Office of the City Clerk
141 WORTH STREET
NEW YORK, NY 10013
United States

as shown by the duly registered license and certificate of marriage of said persons on file in this office.

CERTIFIED THIS DATE AT THE CITY CLERK'S OFFICE

Manhattan N.Y. September 20, 11 20

PLEASE NOTE: Facsimile Signature and seal are printed pursuant to Section 11-A, Domestic Relations Law of New York.

Michael McSweeney
City Clerk of the City of New York

CET-F

M117000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 2/10/14]

Case No. 1:14-cv-129

BRITTANI HENRY, ET AL.,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, M.D., ET AL.,

Defendants.

Judge Timothy S. Black

DECLARATION OF BARBARA THORNELL GINN

I, Barbara Thornell Ginn, under 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following is true and correct:

1. My name is Barbara Thornell Ginn and I provide legal services to Plaintiff Adoption S.T.A.R., Inc. and its clients.

2. I have worked with opposite-sex and same-sex married clients who adopt children that are born in Ohio but adopted through court orders issued in proceedings pending in other states such as New York.

3. Normally when an out-of-state adoption decree is final the court in that state sends notice of the adoption to the Ohio Department of Health (state

where adopted child born), via a Certificate of Adoption, Report of Adoption, or similar Department of Health Vital Statistics form. After receiving the requisite verification that an adoption has been completed, Defendant Director of the Ohio Department of Health, through his staff, then prepares an amended birth certificate that sets out the child's new adoptive name and that lists both of the adoptive parents on the birth certificate as parents of the child.

4. Opposite-sex couples in this situation routinely have both parents' names listed on the birth certificate of their adopted child.

5. On behalf of Adoption S.T.A.R., Inc., I have personally served same-sex clients who have applied to the Ohio Department of Health for an amended birth certificate for their child born in Ohio listing both parents' names who were told that only one of their names can be placed on the birth certificate because Ohio does not recognize same-sex marriages. These clients received this answer even when they presented a New York order approving an adoption for the Ohio-born child and listing both members of the same-sex couple as parents. This presents the clients of Adoption S.T.A.R., Inc. with a terrible dilemma. Which one of these equal parents should be selected to be listed as parent on the birth certificate? This completely unfair and unnecessary "Sophie's choice" situation fills our clients with anguish.

6. I have corresponded with counsel for the Ohio Department of Health who has confirmed that the Department's standard operating procedure is to refuse to list both same-sex married parents on

amended birth certificates and to permit only one be listed as parent.[1]

7. The reason stated for this policy is that Ohio refuses to recognize the marriages of same-sex couples married in states where same-sex marriage is legal.

8. On behalf of Adoption S.T.A.R., Inc., I am currently assisting Joseph J. Vitale and Robert Talmas with their adoption of Adopted Child Doe. They are legally married in New York. They also have an adoption decree from a New York Court recognizing both of them as the adopted parents of Adopted Child Doe. Based on my experience I am certain that Defendants will deny to Joe and Rob and Adopted Child Doe a birth certificate that lists both of them as parents and will instead insist that they choose only one to be listed as parent.

   This policy is unfair and discriminatory and I support their effort to seek treatment equal to that extended to similarly situated opposite sex-couples.

Dated:

/s/ Barbara Thornell Ginn
Barbara Thornell Ginn

---

[1] *See* attached Letter from Ohio Department of Health dated October 17, 2013.

[LOGO] OHIO DEPARTMENT OF HEALTH
246 North High Street
Columbus, Ohio 43215
614/466-3543
www.odh.ohio.gov

John R. Kasich/Governor

Theodore E. Wymyslo, M.D./Director of Health

October 17, 2013

Barbara Thorne11 Ginn, Esq.
1320 Nagel Road
P.O. Box 541144
Cincinnati, Ohio 45254

Re:

Dear Ms. Ginn:

The Ohio Department of Health received the Report of Adoption for_____from the New York State Department of Health.

The Ohio Department of Health is unable to place both_____and_____as the parents on birth certificate because such action conflicts with Ohio adoption law. Revised Code (R.C.) 3107.03, entitled, "Who May Adopt", sets forth the following persons who may adopt:

3107.03 Who may adopt:

The following persons may adopt:

A) A husband and wife together, at last one of whom is an adult;

B) An unmarried adult;

C) The unmarried adult without the other spouse joining as a petitioner if any of the following apply:

1) The other spouse is a parent of the person to be adopted and supports the adoption;

2) The petitioner and the other spouse are separated under section 3103.06 or 3105.17 of the Revised Code;

3) The failure of the other spouse to join in the petition or to support the adoption is found by the court to be by reason of prolonged, unexplained absence, unavailability, incapacity, or circumstances that make it impossible or unreasonably difficult to obtain either the support or refusal of the other spouse.

Effective date: 9-18-1996

R.C. 3107.03 does not authorize two unmarried adults to adopt an individual. In addition, pursuant to R.C. 3101.01, Ohio does not recognize same sex marriages from other jurisdictions. Lastly, RC. 3107.18(A), provides that a court decree establishing the relationship of parent and child by adoption issued by a court outside this state shall be recognized *except* when giving effect to such decree would violate the public policy of this state. Pursuant to RC. 3101.01, Ohio does not recognize same sex marriages and Ohio law does not authorize two unmarried individuals to adopt a person. See, R.C. 3107.03.

The Ohio Department of Health is able to place *either*_____or_____on birth certificate.

Please let me know if your clients wish to place one of their names on the birth certificate. I can be reached at (614) 466-4882.

The Ohio Department of Health will issue and mail a refund to you in the near future.

Sincerely,

/s/ Rachel Belenker
Rachel Belenker
Assistant Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: 2/10/14]

Case No. 1:14-cv-129

BRITTANI HENRY, ET AL.,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, M.D., ET AL.,

Defendants.

Judge Timothy S. Black

DECLARATION OF ATTORNEY WILLIAM S. SINGER

I, William S. Singer, under 28 U.S.C. §1746, declare under the penalty of perjury and under the laws of the United States of America that the following is true and correct:

1. I am an attorney in New Jersey. I provide this declaration with the consent of my clients, Lee Bryant Rosenfield and Jacobo Fastag.

2. In 2007 I represented a same-sex male couple from New Jersey, Lee Bryant Rosenfield and Jacobo Fastag. They are presently married but at that time they had celebrated a civil union under New Jersey law.

3. Their child, E.R., was born in Ohio in 2007.

4. A second parent adoption for ER was finalized in 2007 in the Superior Court of New Jersey, Chancery Division, Family Part.

5. The Ohio Department of Health was notified of the second parent adoption of E.R. and a birth certificate listing both men as parents was requested.

6. The Ohio Department of Health complied with the request and issued a birth certificate that lists a man, Lee Bryant Rosenfield as "Mother" and his same-sex male partner, Jacobo Fastag, as "Father." A redacted copy of that birth certificate is attached.

Dated: 2/7/14

/s/ William S. Singer
William S. Singer

...TY THIS
...EXACT
...ON FILE WITH
...OF HEALTH.

JA-3 08058348

...REGISTRAR
OFFICE OF VITAL STATISTICS
WITNESS MY HAND & SEAL

Reg. Dist. No. 25
Primary Reg. Dist. No. 2501
Registrar's No. 2500-200704730

Ohio Department of Health
VITAL STATISTICS
CERTIFICATE OF LIVE BIRTH

Certificate no. 134-2007-149060

1. CHILD'S NAME (First, Middle, Last, Suffix)			
2. TIME OF BIRTH (24hr)	3. SEX	4. DATE OF BIRTH (Mo/Day/Yr)	
09:07	Male	3/27/2007	
5a. FACILITY NAME (If not institution, give street and number)			
OHIO STATE UNIVERSITY MEDICAL CENTER			
5b. CITY, TOWN OR LOCATION OF BIRTH		5c. COUNTY OF BIRTH	
COLUMBUS		FRANKLIN	
6a. ATTENDANT'S NAME	6b. ATTENDANT'S TITLE		
KEDER, LISA	M.D.		
6c. I certify that the above named child was born alive at the place and time on the date stated above. Lisa Keder		6d. DATE SIGNED (Mo/Day/Yr) April 17, 2007	
7a. MOTHER'S CURRENT LEGAL NAME (First, Middle, Last, Suffix)		7b. DATE OF BIRTH (Mo/Day/Yr)	
LEE BRYANT ROSENFIELD		01/11/1968	
7c. MOTHER'S NAME PRIOR TO FIRST MARRIAGE		7d. BIRTHPLACE (State, Territory, or Foreign Country)	
ROSENFIELD		MASSACHUSETTS	
8a. STREET AND NUMBER OF MOTHER'S RESIDENCE	8b. APT. NO.	8c. CITY, TOWN OR LOCATION	
254 GOAT HILL ROAD		LAMBERTVILLE	
8d. STATE, TERRITORY, OR FOREIGN COUNTRY	8e. ZIP CODE	8f. COUNTY	
NEW JERSEY	08530	HUNTERDON	
9a. FATHER'S CURRENT LEGAL NAME (First, Middle, Last, Suffix)			
JACOBO FASTAG			
9b. DATE OF BIRTH (Mo/Day/Yr)	9c. BIRTHPLACE (State, Territory, or Foreign Country)		
07/15/1964	MEXICO		
10a. REGISTRAR'S SIGNATURE Sandra Taylor		10b. DATE FILED BY REGISTRAR (Mo/Day/Yr) April 18, 2007	

418

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed: 2/10/14]

Case No. 1:14-cv-129

BRITTANI HENRY, ET AL.,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, M.D., ET AL.,

Defendants.

Judge Timothy S. Black

DECLARATION OF JEFFREY SCOTT SEAY

I, Jeffrey Scott Seay, under 28 U.S.C. §1746, declare under the penalty of perjury and under the laws of the United States of America that the following is true and correct:

1. My name is Jeffrey Scott Seay and I reside in Washington, D.C. with my husband, Brent Robert Lee.

2. My husband is the biological father of our three children. The children were all carried by a surrogate and born in Ohio. As explained below I secured a second parent adoption of each of the children in Washington D.C. The Ohio Department of Health placed both of our names on the birth certificate of the child I adopted in 2010. The Department placed only Brent's name on the birth

certificate of the twin boys I adopted in 2012. As detailed in this declaration this difference in treatment has not been explained and is not fair.

3. In August, 2008 Brent and I registered as Domestic Partners in Washington D.C.

4. In November, 2009 our daughter, S.S-L. was born in Ohio.

5. In July, 2010 a final decree of adoption was entered on the docket of the Family Court, Superior Court of the District of Columbia, Washington, D.C. naming me and my husband as "the legal parents of the adoptee [S.S-L.]."

6. In that same decree the District of Columbia was directed "to send appropriate documents to the State of Ohio for the issuance of a new Certificate of Birth for the adoptee, [S.S-L.], naming Brent Robert Lee and Jeffrey Scott Seay as her parents." A redacted copy of the final decree of adoption is attached as A-1.

7. On December 10, 2010, the Ohio Department of Health issued a birth certificate for S.S-L. listing both of us as her parents, placing Jeffrey Scott Seay next to "Mother's Name" and Brent Robert Leland Lee next to "Father's Name" on the birth certificate of S.S-L. A redacted copy of the birth certificate of S.S-L. is attached as A-2.

8. In March, 2011, our twin sons, M.S-L. and C.S-L. were born via surrogacy in Ohio.

9. In November, 2012, final decrees of adoption were entered on the docket of the Family Court, Superior Court of the District of Columbia, Washington, D.C. One named me and my husband as "the legal parents of the adoptee [M.S-L.]" The other named

me and my husband as "the legal parents of the adoptee [C.S-L.]" In those same decrees the District of Columbia was directed "to send appropriate documents to the State of Oho for the issuance of a new Certificate of Birth for the adoptee, [M.S-L. /C.S-L.], naming Brent Robert Lee and Jeffrey Scott Seay as his parents." Redacted copies of the decrees are attached as A-3 and A-4.

10. On December 18, 2012, the Ohio Department of Health issued birth certificates for M.S-L. and C S-L. listing only Brent Robert Lee as the parent and not listing me as a parent anywhere on the certificates. Redacted copies of the birth certificates for M S-L, and C.S-L are attached as A-5 and A-6.

11. Ohio has completely disrespected our family by failing to list me as a parent to our children M.S-L. and C.S-L. Now we have three children born in Ohio and adopted by me. But only one of them has an Ohio birth certificate listing both of us as parents. There can be no proper basis for treating our family in this fashion. What are we to tell M.S-L. and C.S-L.?

12. We do not see any legitimate reason for recognizing my second parent adoption on the birth certificate of one of our children issued in 2010 but not recognizing my second parent adoption on the birth certificates of our two children adopted by me in 2012.

13. We were married in Washington D.C. on November 24, 2013. We are happily married and we love our children very much. We eagerly wait for the day when Ohio recognizes same-sex marriages from other jurisdictions and when it honors adoption

decrees that require both parents be listed on the birth certificates of adopted children.

Dated: February 8, 2014

/s/ Jeffrey Scott Seay
Jeffrey Scott Seay

Exhibit A-1

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA FAMILY COURT
DOMESTIC RELATIONS BRANCH – ADOPTIONS

Adoption Case No. 10 ADA 100

EX PARTE IN THE MATTER OF
THE PETITION OF B.R.L. AND J.S.S.
FOR THE ADOPTION OF A MINOR CHILD

JUDGE JULIET MCKENNA

FINAL DECREE OF ADOPTION

Upon consideration of the Petition for Adoption filed by Jeffrey Scott Seay and Brent Robert Lee for the adoption of a minor child born on November 6, 2009 in Cleveland, Ohio and the record herein, it appears to the satisfaction of the Court: (1) That the Court has jurisdiction pursuant to D.C. Code Ann, § 16-301 (2001); (2) That the adoptee is physically, mentally, and otherwise suitable for adoption by Jeffrey Scott Seay, reserving all existing parental rights of Brent Robert Lee, biological parent of the adoptee; (3) That Petitioner Jeffrey Scott Seay is fit and able to give the adoptee a proper home and education; (4) That the adoption will be in the best interests of the adoptee; (5) That the adoptee has resided with Petitioners since her birth on November 6, 2009, which is more than six months preceding the date of this Final Decree; (6) That the adoption form has been completed pursuant to Section 10 of the Vital Records Act of

1981, D.C. Code Ann. § 7-209 (Supp. 2003); and (7) That the Interstate Compact on Placement of Children Authorization Act of 1989 is not relevant to this adoption, D.C. Code Ann. §§ 4-1421 to 4-1424 (2001 & Supp. 2003).

Accordingly, it is now by the Court this 27th day of July, 2010,

ORDERED, ADJUDGED, AND DECREED:

1. That a Final Decree of Adoption be, and hereby is, entered establishing the legal relationship of natural parent and natural child for all purposes between Jeffrey Scott Seay, Petitioner, and the adoptee, to the same extent as if the adoptee had been naturally born to the Petitioner, reserving Petitioner Brent Robert Lee's parental rights as legal father to the adoptee;

2. That Jeffrey Scott Seay and Brent Robert Lee be, and hereby are, declared to be the legal parents of the adoptee;

3. That the legal name of the adoptee shall remain _____;

4. That the District of Columbia be, and hereby is, ordered to send the appropriate documents to the State of Ohio for issuance of a new Certificate of Birth for the adoptee, _____, naming Brent Robert Lee and Jeffrey Scott Seay as her parents;

5. That the State of Ohio be, and hereby is, requested to change the name headers on the adoptee's birth certificate from "Mother" and "Father" to "Parent"; and

6. That the Clerk of the Court is hereby authorized and directed to furnish four certified copies of this

Final Decree of Adoption to Petitioners through Petitioner's counsel of record in this matter.

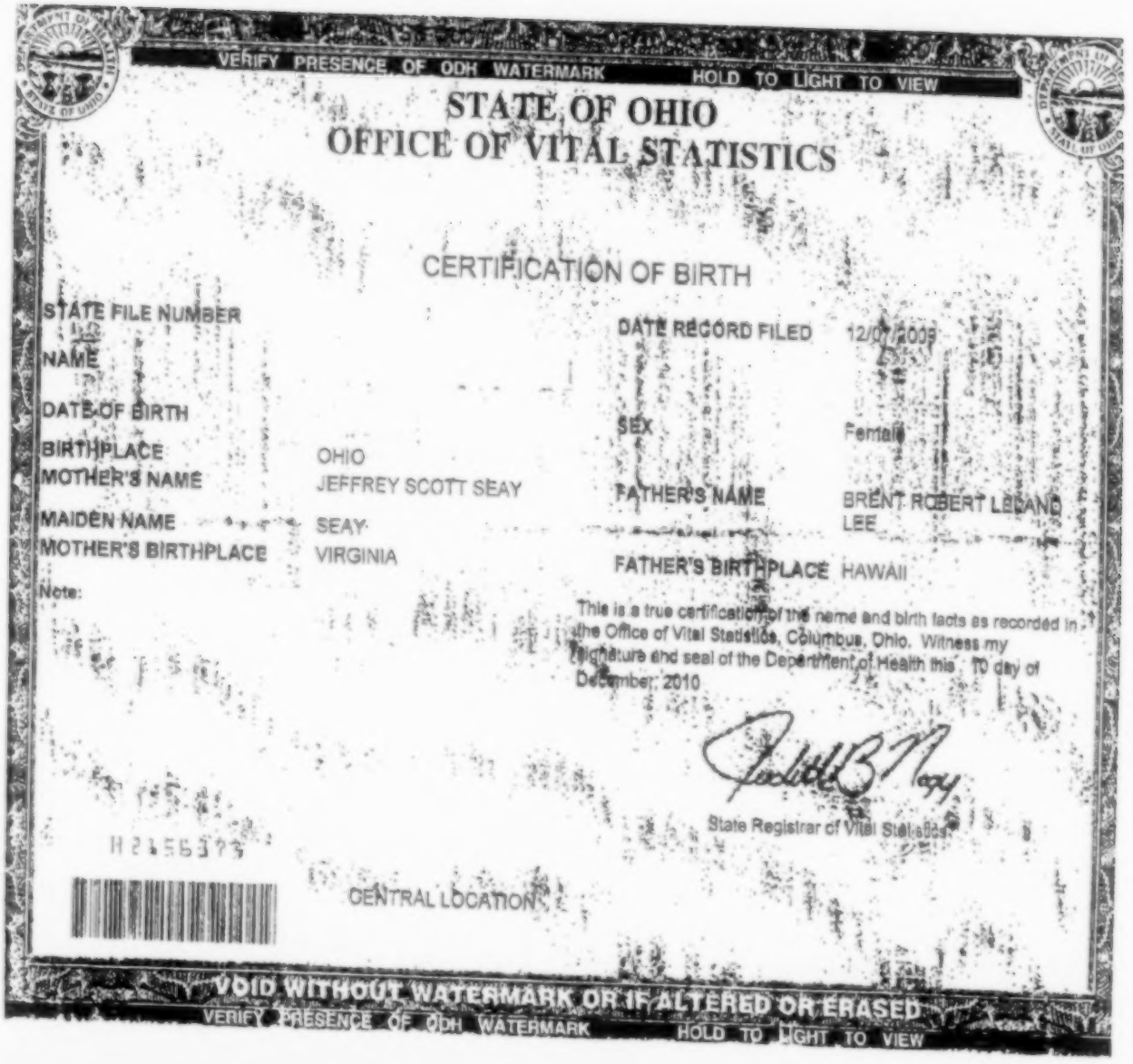
SO ORDERED.

/s/ Juliet J. McKenna
Judge Juliet J. McKenna

Copies to:

Michele Zavos
Michele Zavos Law Group PLLC
1400 Spring Street, Suite 460
Silver Spring, MD 20910
Counsel for Petitioners

Diane S. Hinson
Creative Family Connections, LLC
2 Wisconsin Circle, Suite 700
Chevy Chase, MD 20815
Counsel for Petitioners



VERIFY PRESENCE OF ODH WATERMARK HOLD TO LIGHT TO VIEW

STATE OF OHIO
OFFICE OF VITAL STATISTICS

CERTIFICATION OF BIRTH

STATE FILE NUMBER

NAME

DATE OF BIRTH

BIRTHPLACE OHIO

MOTHER'S NAME JEFFREY SCOTT SEAY

MAIDEN NAME SEAY

MOTHER'S BIRTHPLACE VIRGINIA

DATE RECORD FILED 12/07/2009

SEX Female

FATHER'S NAME BRENT ROBERT LEDAND LEE

FATHER'S BIRTHPLACE HAWAII

Note:

This is a true certification of the name and birth facts as recorded in the Office of Vital Statistics, Columbus, Ohio. Witness my signature and seal of the Department of Health this 10 day of December, 2010

State Registrar of Vital Statistics

H2156373

CENTRAL LOCATION

VOID WITHOUT WATERMARK OR IF ALTERED OR ERASED

VERIFY PRESENCE OF ODH WATERMARK HOLD TO LIGHT TO VIEW

Exhibit A-3

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA FAMILY COURT DOMESTIC RELATIONS BRANCH – ADOPTIONS

Adoption No. 12 ADA 167

EX PARTE IN THE MATTER OF
THE PETITION OF B.R.L. AND J.S.S.
FOR THE ADOPTION OF A MINOR CHILD

JUDGE CAROL A. DALTON

FINAL DECREE OF OPTION

Upon consideration of the Petition for Adoption filed by Jeffrey Scott Seay and Brent Robert Lee for the adoption of the minor child _____, born on March 7, 2011 in Ohio and upon the report and recommendation of the Child and Family Services Agency of the District of Columbia, it appears to the satisfaction of the Court: (1) That the Court has jurisdiction pursuant to D.C. Code Ann. § 16-301 (2001); (2) That the Petitioners are residents of the District of Columbia; (3) That the adoptee is physically, mentally, and otherwise suitable for adoption by Jeffrey Scott Seay, reserving the parental rights to Brent Robert Lee; (4) That all required consents have been properly taken and executed; (5) That Jeffrey Scott Seay and Brent Robert Lee are fit and able to give the adoptee a proper home and education; (6) That the adoption will be in the best interests of the adoptee; (7) That the adoptee has

resided with Jeffrey Scott Seay and Brent Robert Lee since his birth on March 7, 2011, which is more than six months preceding the date of this Final Decree; (8) That the adoption form has been completed pursuant to Section 10 of the Vital Records Act of 1981, D.C. Code Ann. § 7-209 (Supp 2003); (9) That the adoptee is physically, mentally, and otherwise suitable for adoption; (10) That the law of the District of Columbia permits adoption by persons in a relationship as exists between Jeffrey Scott Seay and Brent Robert Lee, and reserving all existing parental rights of Brent Robert Lee, legal father of the prospective adoptee; and (11) That the Interstate Compact on Placement of Children Authorization Act of 1989 is not relevant to this adoption, D.C. Code Ann. §§ 4-1421 to 4-1424 (2001 & Supp, 2003).

Accordingly, it is now by the Court this 28th day of November, 2012,

ORDERED, ADJUDGED, AND DECREED:

1. That a Final Decree of Adoption be, and hereby is, entered establishing the legal relationship of parent and child for all purposes between Jeffrey Scott Seay, Petitioner, and the adoptee,_____, and between Brent Robert Lee and the adoptee to the same extent as if the adoptee were the biological child of both Jeffrey Scott Seay and Brent Robert Lee, reserving Petitioner Brent Robert Lee's parental rights as legal father to _____;

2. That the parental rights of any biological mother or birth mother to _____is hereby terminated;

3. That Jeffrey Scott Seay and Brent Robert Lee be, and hereby are, declared to be the legal parents of _____;

4. That the District of Columbia be, and hereby is, ordered to send the appropriate documents to the State of Ohio for issuance of a new Certificate of Birth for the adoptee, _____, naming Brent Robert Lee and Jeffrey Scott Seay as his parents;

5. That the State of Ohio be, and hereby is, requested to change the name headers on the adoptee's birth certificate from "Mother" and "Father" to "Parent" and "Parent";

6. That if the State of Ohio declines to change the name headers on the adoptee's birth certificate as requested in paragraph 5, then Brent Robert Lee shall be named as "Father" and Jeffrey Scott Seay shall be named as "Mother" on the adoptee's birth certificate issued in conformance with this Final Decree of Adoption.

7. That the Clerk of the Court is hereby authorized and directed to furnish four certified copies of this Final Decree of Adoption to the Petitioners through the Petitioners counsel of record in this matter.

/s/ Carol Ann Dalton
JUDGE CAROL ANN DALTON

Copies to: Diane S. Hinson
Creative Family Connections LLC
2 Wisconsin Circle
Suite 700
Chevy Chase, MD 20815

Attorney for Petitioners

Exhibit A-4

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA FAMILY COURT
DOMESTIC RELATIONS BRANCH – ADOPTIONS

Adoption No. 12 ADA 166

EX PARTE IN THE MATTER OF
THE PETITION OF B.R.L. AND J.S.S.
FOR THE ADOPTION OF A MINOR

JUDGE CAROL A. DALTON

FINAL DECREE OF ADOPTION

Upon consideration of the Petition for Adoption filed by Jeffrey Scott Seay and Brent Robert Lee for the adoption of the minor child _____ born on March 7, 2011, in Ohio and upon the report and recommendation of the Child and Family Services Agency of the District of Columbia, it appears to the satisfaction of the Court: (1) That the Court has jurisdiction pursuant to D.C. Code Ann § 16-301 (2001); (2) That the Petitioners are residents of the District of Columbia; (3) That the adoptee is physically, mentally, and otherwise suitable for adoption by Jeffrey Scott Seay, reserving the parental rights to Brent Robert Lee; (4) That all required consents have been properly taken and executed; (5) That Jeffrey Scott Seay and Brent Robert Lee are fit and able to give the adoptee a proper home and education; (6) That the adoption will be in the best interests of the adoptee; (7) That the adoptee has

resided with Jeffrey Scott Seay and Brent Robert Lee since his birth on March 7, 2011, which is more than six months preceding the date of this Final Decree; (8) That the adoption form has been completed pursuant to Section 10 of the Vital Records Act of 1981, D.C. Code Ann. § 7-209 (Supp. 2003); (9) That the adoptee is physically, mentally, and otherwise suitable for adoption; (10) That the law of the District of Columbia permits adoption by persons in a relationship as exists between Jeffrey Scott Seay and Brent Robert Lee, and reserving all existing parental rights of Brent Robert Lee, legal father of the prospective adoptee; and (11) That the Interstate Compact on Placement of Children Authorization Act of 1989 is not relevant to this adoption, D.C. Code Ann. §§ 4-1421 to 4-1424 (2001 & Supp. 2003)

Accordingly, it is now by the Court this 28th day of November, 2012,

ORDERED, ADJUDGED, AND DECREED;

1. That a Final Decree of Adoption be, and hereby is, entered establishing the legal relationship of parent and child for all purposes between Jeffrey Scott Seay, Petitioner, and the adoptee, _____ , and between Brent Robert Lee and the adoptee to the same extent as if the adoptee were the biological child of both, Jeffrey Scott Seay and Brent Robert Lee, reserving Petitioner Brent Robert Lee's parental rights as legal father to _____;

2. That the parental rights of any biological mother or birth mother to _____ is hereby terminated;

3. That Jeffrey Scott Seay and Brent Robert Lee be, and hereby, are declared to be the legal parents of _____;

4. That the District of Columbia be, and hereby is, ordered to send the appropriate documents to the State of Ohio for issuance of a new Certificate of Birth for the adoptee, _____ naming Brent Robert Lee and Jeffrey Scott Seay as his parents;

5. That the State of Ohio be, and hereby is, requested to change the name headers on the adoptee's birth certificate from "Mother" and "Father" to "Parent" and "Parent";

6. That if the State of Ohio declines to change the name headers on the adoptee's birth certificate as requested in paragraph 5, then Brent Robert Lee shall be named as "Father" and Jeffrey Scott Seay shall be named as "Mother" on the adoptee's birth certificate issued in conformance with this Final Decree of Adoption.

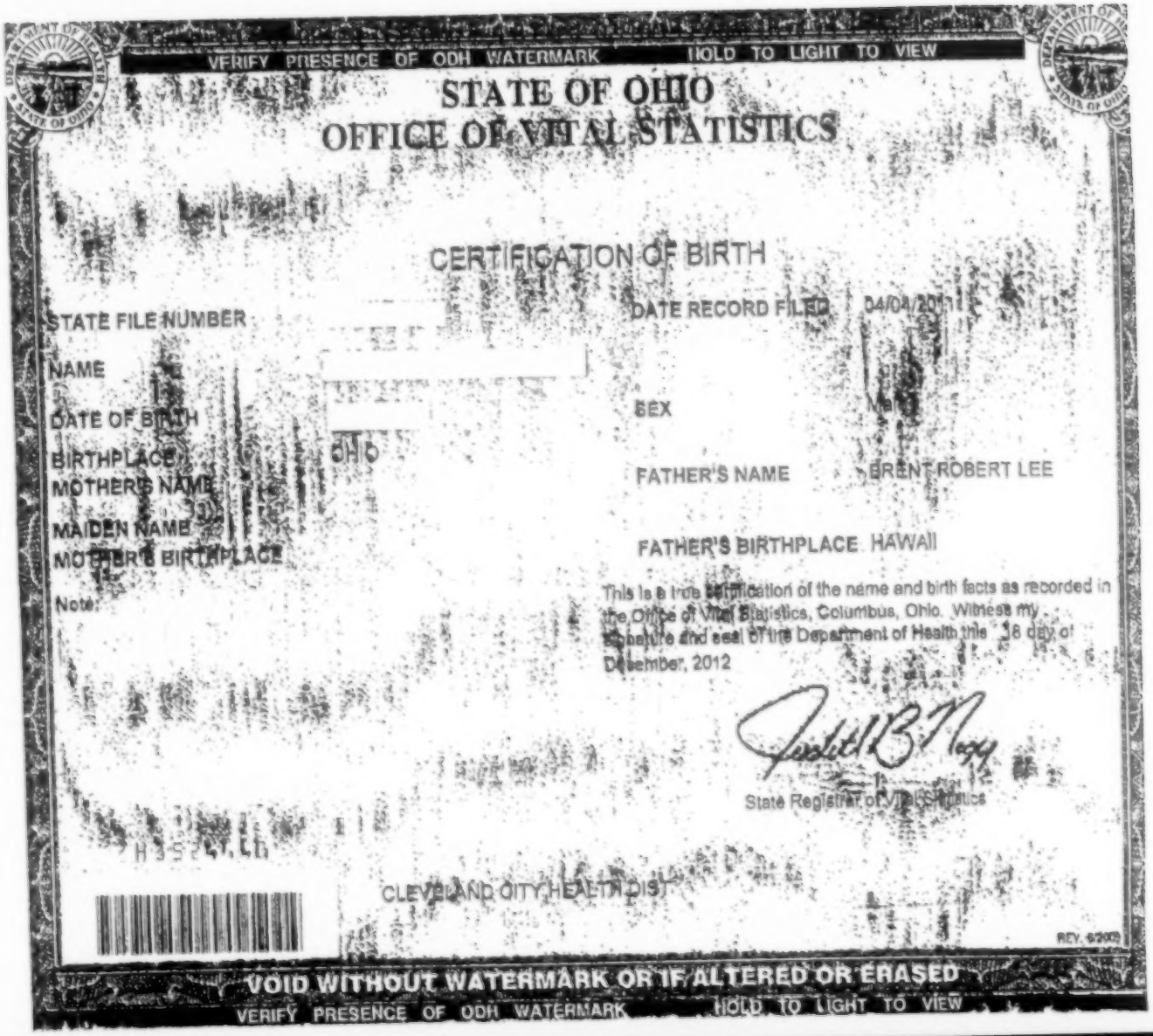
7. That the Clerk of the Court is hereby authorized and directed to furnish four certified copies of this Final Decree of Adoption to the Petitioners through the Petitioner's counsel of record in this matter.

/s/ Carol Ann Dalton
JUDGE CAROL ANN DALTON

Copies to:

Diane S. Hinson
Creative Family Connections LLC
2 Wisconsin Circle
Suite 700
Chevy Chase, MD 20815

Attorney for Petitioners



VERIFY PRESENCE OF ODH WATERMARK HOLD TO LIGHT TO VIEW

STATE OF OHIO
OFFICE OF VITAL STATISTICS

CERTIFICATION OF BIRTH

STATE FILE NUMBER

DATE RECORD FILED 04/04/201

NAME

DATE OF BIRTH

SEX

BIRTHPLACE OHIO

MOTHER'S NAME

FATHER'S NAME BRENT ROBERT LEE

MAIDEN NAME

MOTHER'S BIRTHPLACE

FATHER'S BIRTHPLACE HAWAII

Note:

This is a true certification of the name and birth facts as recorded in the Office of Vital Statistics, Columbus, Ohio. Witness my signature and seal of the Department of Health this 18 day of December, 2012

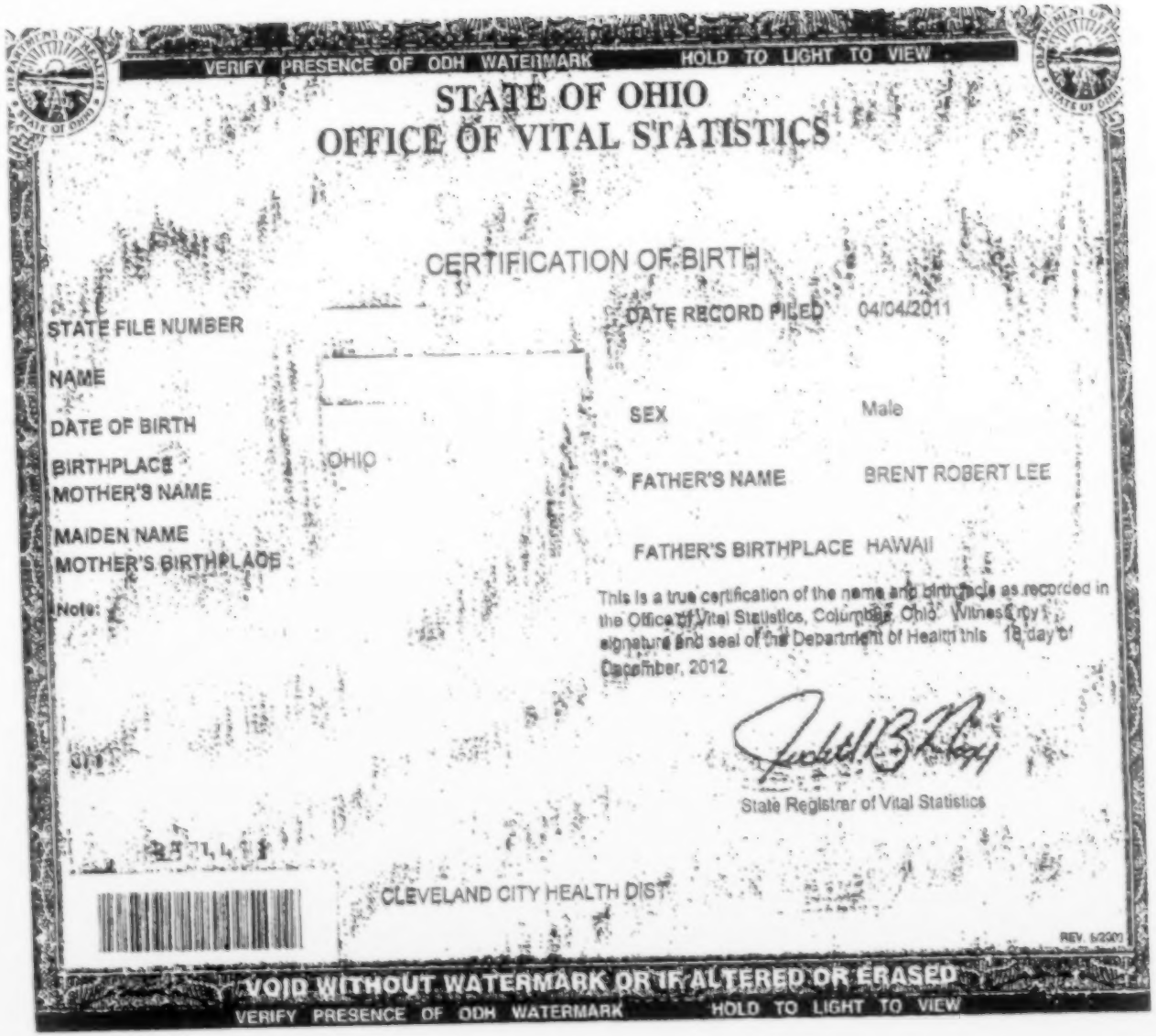
State Registrar of Vital Statistics

CLEVELAND CITY HEALTH DIST

REV. 6/2009

VOID WITHOUT WATERMARK OR IF ALTERED OR ERASED

VERIFY PRESENCE OF ODH WATERMARK HOLD TO LIGHT TO VIEW



VERIFY PRESENCE OF ODH WATERMARK HOLD TO LIGHT TO VIEW

STATE OF OHIO
OFFICE OF VITAL STATISTICS

CERTIFICATION OF BIRTH

STATE FILE NUMBER

DATE RECORD FILED 04/04/2011

NAME

SEX Male

DATE OF BIRTH

BIRTHPLACE OHIO

MOTHER'S NAME

FATHER'S NAME BRENT ROBERT LEE

MAIDEN NAME

MOTHER'S BIRTHPLACE

FATHER'S BIRTHPLACE HAWAII

Note:

This is a true certification of the name and birthplace as recorded in the Office of Vital Statistics, Columbus, Ohio. Witness my hand and official signature and seal of the Department of Health this 18 day of December, 2012

State Registrar of Vital Statistics

CLEVELAND CITY HEALTH DIST

REV. 6/2007

VOID WITHOUT WATERMARK OR IF ALTERED OR ERASED

VERIFY PRESENCE OF ODH WATERMARK HOLD TO LIGHT TO VIEW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed: 2/28/14]

Case No. 1:14-cv-129

BRITTANI HENRY, ET AL.,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, M.D., ET AL.,

Defendants.

Judge: Timothy S. Black

STIPULATIONS

1. The parties hereby stipulate to the facts set forth below describing in part the current practice with respect to the issuance of birth certificates in Ohio. These stipulations are not intended to and do not provide a comprehensive depiction of the body of statutes and practices that relate to the issuance of birth certificates in Ohio under all circumstances. The parties note that the law speaks for itself. Additionally, while the stipulations are accurate, these stipulations do not constitute agreement by either party as to the relevance or legal import of any of any of the statements herein to the issues raised in this litigation. When a child is born in a hospital or other birth facility, the facility initiates the process of issuing a birth certificate by

obtaining information about the child and the birth parents. In addition, the facility may abstract medical data from its records either electronically or through a written worksheet of its own design.

2. A suggested worksheet is provided to the hospital or other birth facility by the Ohio Department of Health (ODH) to be completed by the "mother of the child," the "father of the child" or "other" person providing information. A copy of the suggested worksheet is attached as A-1. The hospital or birth facility may utilize the suggested worksheet or a worksheet of its own creation for obtaining the requisite information.

3. The suggested worksheet states in part: "The information you provide below will be used to create your child's birth certificate as well as other public health purposes. The birth certificate is a document that will be used for important purposes including proving your child's age, citizenship and parentage. The birth certificate will be used by your child throughout his/her life."

4. Question number 18 of the suggested worksheet asks the mother to answer: "Were you married at the time you conceived this child, at the time of birth, or within the last 300 days prior to the birth of your child?"

5. The hospital or birth facility where the child is born fills out a separate worksheet or electronically collects information on the health of the birth mother and the infant that is used by health and medical researchers but does not appear on the birth certificate.

6. The hospital or birth facility then enters the information gathered into the Integrated Perinatal

Health Information System (IPHIS), a database maintained by ODH which collects pregnancy and newborn data. Two flow sheets (pages 4 and 5 of IPHIS) describing the typical sequence of steps leading to a birth certificate are attached as A-2 and A -3.

7. If the record is complete, IPHIS generates a printed birth certificate which lists the name of the child, the date and place of birth, the sex, the mother's name and birthplace, and the father's name and birthplace. A state file number is also assigned. A sample record is attached as A-4.

8. The printed birth certificate generated by IPHIS is signed by a physician in attendance at the birth.

9. O.R.C. §3705.09 (A) states: "A birth certificate for each live birth in this section shall be filed in the registration district in which it occurs within ten days after such birth and shall be registered if it has been completed and filed in accordance with this section."

10. The local registrar verifies that the birth certificate is complete. If it is complete, the registrar signs the birth certificate and the original is filed with ODH, Office of Vital Statistics. If not, the birth certificate is rejected and returned to the birth facility to be completed.

11. If a married woman in an opposite-sex marriage refuses to provide her husband's name as the father of her child, the birth certificate is signed and forwarded to the local registrar where it is placed in a hold status until the parent either completes the father's information or provides court documentation to exclude the husband from being listed on the certificate. A certificate in a hold

status is not filed or registered; no legal copy can be issued.

12. For purposes of Ohio's statutory scheme regarding vital statistics, relevant definitions for which are set forth in O.R.C. §3705.01, a birth certificate is "filed" when "present[ed] for registration by the office of vital statistics." O.R.C. §3705.01 (P). "[A]cceptance by the office of vital statistics and the incorporation of [the birth certificate] into its official records" constitutes "registration" of the birth certificate. O.R.C. §3705.01 (Q). "[A] birth certificate that has been registered with the office of vital statistics" is a "birth record" as defined in O.R.C. § 3705.01 (R).

13. As one part of Ohio's statutory scheme governing parentage, O.R.C. §3111.03 sets forth specified circumstances under which "[a] man is presumed to be the natural father of a child," including when "[t]he man and the child's mother are or have been married to each other, and the child is born during the marriage or is born within three hundred days after the marriage is terminated by death, annulment, divorce, or dissolution or after the man and the child's mother separate pursuant to a separation agreement." O.R.C. §3111.03 (A) (1).

14. As one part of Ohio's statutory scheme governing parentage, O.R.C. §3111.95 (A) states: "If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband."

15. As one part of Ohio's statutory scheme governing adoption, O.R.C. §3107.19 provides that if a child adopted in Ohio was born in Ohio, the Ohio probate court of the county where the adoption takes place shall forward specified information to the Department of Health, including "a copy of the adopted person's certificate of adoption," "within thirty days after an adoption decree becomes final."

16. "When the adoption of a child whose birth occurred in this state is decreed by a court in another state and when the department of health has received, from the court that decreed the adoption, an official communication containing information similar to that contained in the certificate of adoption for adoptions decreed in this state," the procedures for issuance of a new or foreign birth record after adoption set forth in R.C. 3705.12 (A) apply "just as if the adoption had taken place in this state." R.C. 3705.12(B).

17. As part of Ohio's statutory scheme governing vital statistics, O.R.C. §3705.12 (A) (1) states: "Upon receipt of the items sent by a probate court pursuant to section 3107.19 of the Revised Code concerning the adoption of a child born in this state whose adoption was decreed on or after January 1, 1964, the department of health shall issue, unless otherwise requested by the adoptive parents, a new birth record using the child's adopted name and the names of and data concerning the adoptive parents."

18. O.R.C. §3705.12 (A) (1) further states: "The new birth record shall have the same overall appearance as the record that would have been issued under section 3705.09 of the Revised Code if the adopted child had been born to the adoptive

parents." O.R.C. §3705.12 (A) (2) states: "Upon the issuance of the new birth record, the original birth record shall cease to be a public record. The index references to the original birth record, including references that were not a public record under this section as it existed prior to the effective date of this amendment, are a public record under section 149.43 of the Revised Code. The department shall place the original birth record and the items sent by the probate court pursuant to section 3107.19 of the Revised Code in an adoption file and seal the file. The contents of the adoption file shall not be open to inspection, be copied, or be available for copying, except [as specified in O.R.C. §3705.12 (A)(2)(a)-(g)]." O.R.C. §3705.12 (A) (3) mandates that "the probate court shall retain permanently in the file of the adoption proceedings information that is necessary to enable the court to identify both the child's original birth record and the child's new birth record."

AGREED:

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

[Filed: 02/28/14]

Civil Action No. 1:14-cv-129

BRITTANI HENRY AND BRITTNI ROGERS, ET AL.,

Plaintiffs,

vs.

THEODORE E. WYMYSLO, M.D., ET AL.,

Defendants.

Judge Timothy S. Black

DECLARATION OF ALPHONSE A. GERHARDSTEIN IN SUPPORT OF PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND PERMANENT INJUNCTIVE RELIEF

I, Alphonse A. Gerhardstein, pursuant to 28 U.S.C. §1746, declare under the penalty of perjury under the laws of the United States of America that the following is true and correct:

1. I am trial counsel for Plaintiffs in the above action.
2. I submit this declaration in support of Plaintiffs' Motion for Declaratory Judgment and Permanent Injunctive Relief and supporting memorandum.
3. Attached to this declaration are the following exhibits referred to in Plaintiff's memorandum.

Exhibit A is a true and accurate Final Decree of Adoption for Plaintiff Adopted Child Doe from the Surrogate's Court of the State of New York, of which this Court may take judicial notice. Counsel for Defendants do not object to this Court taking such notice.

4. Also attached as Exhibits B through H are the expert declarations previously submitted and considered by the Court in Obergefell v. Wymyslo, 1:13-CV-501 (2013). Defendants do not object to this Court taking judicial notice of Exhibits B through H. (Defendant Director of the Ohio Department of Health's Answer to the Plaintiffs' Complaint, Doc. 15, ¶ 73).

Exhibit B. Expert Declaration with exhibits of Susan J. Becker, submitted to this Court in *Obergefell v. Wymyslo*, 1:13-CV-501 (2013).

Exhibit C. Expert Declaration with exhibits of George Chauncey, submitted to this Court in *Obergefell v. Wymyslo*, 1:13-CV-501 (2013).

Exhibit D. Expert Declaration with exhibits of Megan Fulcher, submitted to this Court in *Obergefell v. Wymyslo*, 1:13-CV-501 (2013).

Exhibit E. Expert Declaration with exhibits of Joanna L. Grossman, submitted to this Court in *Obergefell v. Wymyslo*, 1:13-CV-501 (2013).

Exhibit F. Expert Declaration with exhibits of Bernard L. McKay, submitted to this

Court in *Obergefell v. Wymyslo*, 1:13-CV-501 (2013).

Exhibit G. Expert Declaration with exhibits of Letitia Anne Peplau, submitted to this Court in *Obergefell v. Wymyslo*, 1:13-CV-501 (2013).

Exhibit H. Expert Declaration with exhibits of Gary M. Segura, submitted to this Court in *Obergefell v. Wymyslo*, 1:13-CV-501 (2013).

Dated: February 28, 2014

s/ Alphonse A. Gerhardstein
Alphonse A. Gerhardstein

D.R.L. §§ 111, 112(b), 113, 114

Adoption Form 13-A

Form 13-A (Order of Adoption-Agency) (8/2010)

At a term of the Surrogate's Court of the State of New York, held in and for the County of New York, At 31 Chambers Street, New York, NY 10007 On January 17, 2014

(File) No. 126-13

In the Matter of the Adoption of A Child Whose First Name Is

ORDER OF ADOPTION
(Agency)

Present: Hon. Nora S. Anderson, Judge

The Petition of Joseph Vitale and Robert Talmas, verified the 28th day of August, 2013, having been duly presented to this Court, together with an agreement on the part of the petitioning adoptive parent to adopt and treat as her/his own lawful child the adoptive child having the given first name of_____and whose full name is_____and whose birthday is_____2013, and who was born in the state of Ohio as set forth in the verified schedule attached to the petition for adoption and having been made a part thereof; together with a document

setting forth all available information comprising the adoptive child's medical history; together with the affidavit of Clifford L. Greenberg and the consents of Adoption S.T.A.R.

AND together with the written post-adoption contact agreement, consented to by Petitioner , by the child's birth parent by the child's law guardian , by the child's sibling(s) or half-sibling(s) and by the child, attached and incorporated into this Order;[1]

AND, although (his)(her)(their) consent(s) (is)(are) not required, the Court having given notice of the proposed adoption to [specify]:

AND the above-named petitioning adoptive parent(s) and the adoptive child and all other persons whose consents are required having personally appeared before this Court for examination, (except [specify]:

[Required in cases involving Native-American children; check if applicable]:

□ And the following having been duly notified [check applicable box(es)]:

□ parent/custodian □ tribe/nation □United States Secretary of the Interior;

And the tribe/nation having: □ appeared
□ not appeared;

AND the agency having obtained a New York State and national criminal history of the petitioning

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[1] NOTE: If a post-adoption contact agreement is incorporated into this order, the court-ordered agreement, but not this Order, shall be given to the birth parents.

adoptive parents and adults over 18 residing in their home and [check applicable box]:

☒ such check having revealed no disqualifying convictions, as provided in Section 378-a of the Social Services Law;

☐ such check having revealed that Petitioner [specify]: was criminally convicted but the Court having determined that denial of Petitioner's petition will create an unreasonable risk of harm to the physical or mental health of the child and that granting the petition will not place the child's safety in jeopardy and will be in the best interests of the child, pursuant to Social Services Law §378- a(2)(e)(1);

☐ such check having revealed that another adult over 18 in the home [specify]: was criminally convicted but the Court having determined that adoption by the Petitioner(s) will nonetheless be in the child's best interests;

AND an investigation having been ordered and made and the written report of such investigation having been filed with the Court, as required by the Domestic Relations Law;

[Check if applicable]: ☒ AND the verified report of Adoption S.T.A.R., the authorized agency. dated____; is hereby accepted, pursuant to section 113 of the Domestic Relations Law, as the report of investigation required by section 112 of the Domestic Relations Law;

AND the adoptive child having resided with the petitioning adoptive parent(s) since: 2013; and [check box, if applicable]: ☐ the judge having dispensed with the three month period of residency with the adoptive parent(s), pursuant to section 112 of the Domestic Relations Law because [specify]:

AND the court having inquired of the statewide central register of child abuse and maltreatment and having been informed that [check applicable box(es)]:

☒ Neither the adoptive parent(s) (is) (are) not the subject of, or another person named in, an indicated report filed with such register as such terms are defined in section 412 of the Social Services Law);

☐ The adoptive parent(s) (is) (are) the subject of, or another person named in, an indicated report filed with such register as such terms are defined in section 412 of the Social Services Law, as follows [specify]: _____and the Court having given due consideration to the information contained therein;

AND this Court having determined that the best interests of the adoptive child will be promoted by the adoption and that there is no reasonable objection to the proposed change of the name of the adoptive child;

NOW, on motion of Clifford L. Greenberg, attorney for the petitioner(s) herein, and upon all the papers and proceedings herein, it is

ORDERED that the petition of Joseph Vitale and Robert Talmas for the adoption of _____, a person born on_____ 2013 in Ohio is allowed and approved; and it is further

ORDERED that the adoptive child shall henceforth be regarded and treated in all respects as the lawful child of the adoptive parent(s); and it is further

ORDERED that the name of the adoptive child shall be changed to and that the adoptive child shall hereafter be known by that name; and it is further

ORDERED that the Clerk prepare, certify and deliver to The Law Offices of Clifford L. Greenberg,

P.C., LLP at 363 Seventh Avenue, Suite 400, New York, NY 10001 a copy of this order; and it is further

ORDERED that the child's medical history; heritage of the parents, which shall include nationality, ethnic background and race; education, which shall be the number of years of school completed by the parents at the time of the birth of the adoptive child; general physical appearance of the parents at the time of the birth of the adoptive child, including height, weight, color of hair, eyes, skin; occupation of the parents at the time of birth of the adoptive child; health and medical history of the parents at the time of birth of the adoptive child, including all available information setting forth conditions or diseases believed to be hereditary, any drugs or medication taken during pregnancy by the mother; and other information which may be a factor influencing the child's present or future well-being; and talents, hobbies and special interests of the parents as contained in the petition, shall be furnished to the adoptive parent(s); and it is

[Check box if applicable]: ORDERED that the post-adoption contact agreement, which was approved as being in the child's best interests by the Court that approved the child's conditional surrender and which was consented to in writing by the following:

Adoptive parent:

Birth parents:

Adoptive child's law guardian:

Sibling(s) or half-sibling(s) over the age of 14, if contact is with siblings or half-siblings is hereby incorporated into this Order of Adoption; and a true copy of such post-adoption contact agreement and

Order of Incorporation shall be given to all parties to the post-adoption contact agreement;[2] and it is further

[Check box if applicable]: ☒ ORDERED that, if required by a governmental agency, including but not limited to, the United States Social Security Administration, the United States Passport Office and the New York State Department of Motor Vehicles, in connection with an application submitted by or on behalf of the adoptive child, the adoptive parent(s)' attorney :Clifford L. Greenberg, Esq. is authorized to deliver a certified copy of this Order of Adoption to such agency directly or to the adoptive parent, as he or she deems appropriate; and it is further

ORDERED that this order, together with all, other papers pertaining to the adoption, shall be filed and kept as provided in the Domestic Relations Law and shall not be subject to access or inspection except as provided in this Order or such Law.

ENTER

NORA S. ANDERSON

☐ Judge of the Family Court ☐ Surrogate

Dated: 1-17-14.

PURSUANT TO SECTION 1113 OF THE FAMILY COURT ACT, AN APPEAL FROM THIS ORDER MUST BE TAKEN WITHIN 30 DAYS OF RECEIPT OF THE ORDER BY APPELLANT IN COURT, 35 DAYS FROM THE DATE OF MAILING OF THE ORDER TO APPELLANT BY THE CLERK OF COURT, OR 30 DAYS AFTER SERVICE BY A

---

[2] The Order of Incorporation and Post-Adoption Contact Agreement, but not this Order of Adoption, must be given to the parties to the agreement.

PARTY OR THE LAW GUARDIAN UPON THE APPELLANT, WHICHEVER IS EARLIEST.

Check applicable box:

☐ Order mailed on [specify date(s) and to whom mailed]:_____

☐ Order received in court on [specify date(s) and to whom given]:_____

[ORIGINAL FILED JANUARY 17, 2014
A TRUE COPY
CLERK OF THE SURROGATE'S COURT]

Harm Suffered Due to Failure to Recognize Same-Sex Marriages in Context of Birth Certificate

Harm	Source	Explanation
Co-custody	*In re Bonfield*, 97 Ohio St.3d 387 (Ohio 2002) Decl. of Susan J. Becker, Doc. 17-3, ¶ 19.	To circumvent some of the problems associated with a lack of parental recognition, same-sex couples often enter into co-custody agreements to give the non-certified parent certain limited rights with respect to the child. Co-custody agreements can provide the non-certified parent with the ability to make some medical decisions, sign field trip forms for school, and seek visitation with the child if the couple separates. However, co-custody agreements do not create the full rights and responsibilities of a legally recognized child-parent relationship. The right to continued companionship is under the continuing jurisdiction of the court until the child is emancipated As a result, a custodian can be denied custody of the child based on a best interest test. Heterosexual couples who have their parentage recognized by Ohio risk losing their parental rights based only upon a showing that they have abused, neglected or abandoned the child. This is an extremely high standard when compared to the best interest standard.
Child support	O.R.C. § 2151.231	For a child born in Ohio to married same-sex parents, that child may be denied the support of two parents. The non-certified parent will have no legally recognized obligation to support the child. A child has the right to be supported by both parents and both parents have the obligation to support the child.
Travel	*See Children – Child Traveling With One Parent or Someone Who is Not a Parent or Legal Guardian or a Group*, U.S. Customs & Border Protection (July 31, 2013), https://help.cbp.gov/app/answers/detail/a_id/268/kw/children%20birth%20certificate/sno/1	Though a child may secure a US passport with only one parent listed on the birth certificate, the non-certified parent is denied the right to travel unencumbered with the child without additional documentation which must be provided by the parent on the birth certificate. This could be a barrier in the event the parents are no longer cooperating with each other.

Harm	Source	Explanation
Inheritance	Decl. of McKay, Doc. 17-7, ¶ 30. O.R.C. § 2105.06	Ohio does not currently recognize an out-of-state adoption order for same-sex parent and does not recognize the marriages of same sex parents who give birth to their child in Ohio. Therefore the child may be denied intestate inheritance rights from the non-certified parent who dies in Ohio. The child is disadvantaged because the child cannot inherit from this non-certified parent without that parent having made specific provisions in his/her estate plan.
Adoption of child born to married same-sex couple	O.R.C. § 3107.05 (B) O.R.C. § 3107.06 O.R.C. § 3107.41; O.R.C. § 3107.47	A birth certificate must be filed in adoption proceedings to establish who must consent to the adoption. (See Petition for Adoption); (ORC § 3107.05 (B)). In a heterosexual marriage, a spouse will automatically be named on the birth certificate, and would thus have a right to consent or object to the adoption. In a same-sex marriage, the named parent could potentially place the child for adoption without disclosing that he or she is married. The non-certified parent would have no right to notice and no right to withhold consent to the adoption. Because he/she is not recognized as married in Ohio, his/her consent is not necessary. (ORC 3107.06) A child born in Ohio to married same-sex parents may have no knowledge of the other parent in the event the parents are no longer residing together. If the child's parents were married and heterosexual, the child would have knowledge of both parents through the birth certificate even if one parent is now absent from the child. This is further complicated by the possibility that the non-certified parent may be a parent by adoption. In that case, the child may have no knowledge that he/she has been adopted under Ohio's present practice. His/her birth certificate would give no evidence of this in Ohio. The child would have an insurmountable obstacle because the child would essentially have to communicate with 50 different states to determine if he/she is an adopted child. If he/she is an adopted child, each state has its own regulations about accessing records. In Ohio, adoption records are sealed. There is a complicated process one must follow in order to secure identifying information. In Ohio, that identifying information is only available upon the consent of the parent or upon the parent's death. (ORC 3107.41 and ORC 3107.47)
Name change	O.R.C. § 2171.01	Many of the issues that arise in the context of adoption also arise in a name change which generally requires both parents consent.

Harm	Source	Explanation
Taxes	O.R.C. 5747.01 (C)	Unless there is an order of adoption from outside of the state or other court order, Ohio's failure to recognize the parent-child relationship of same-sex parents living in Ohio for a child born in Ohio significantly burdens the non-certified parent because that parent is unable to claim the child as a dependency exemption in Ohio.
Access to records	45 CFR 164.502(g) *See Personal Representatives: Parents and Unemancipated Minors.* (05/03) http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/personalreps.html O.R.C. §3701.74 (B); *Biddle v. Warren General Hospital, et al.*, 86 Ohio St. 3d 395 (1999).	Ohio parents whose out-of-state marriages are not recognized by Ohio on the child's birth certificate are unable to have equal access to hospitals, hospital records, medical care, school activities and records without additional documentation being provided to the non-certified parent by the parent on the birth certificate. This adds another layer of complication when parents no longer reside together.
Health insurance and other employee benefits	O.R.C. 3127(B)(7) Decl. of McKay, Doc. 17-7, ¶ 66.	A custodian may be able to secure health insurance for the child but this coverage cannot be implemented until the order of co-custody is granted and, under certain circumstances, that may not happen until at least six months after Ohio has become the home state of the child. In some instances, insurance companies will refuse coverage of a child based on the language of the insurance plan even where a court has approved a co-custody agreement. Many private employers limit their employment benefits to the spouse and dependents of a heterosexual married employee, sometimes relying on state refusals to recognize same-sex marriages.
Genetics and parentage	O.R.C. § 3111.88 O.R.C. § 3111.97 Decl. of Joanna Grossman, Doc. 17-6, ¶ 49(e).	Ohio permits married and unmarried heterosexual couples to name both parents on their child's birth certificate. This is true when sperm and embryo donors are utilized, even when one or both are not genetically related to the child. The denial of marriage recognition can lead to uncertainty and protracted litigation about parentage status vis-à-vis the biological child of a same-sex spouse.

Harm	Source	Explanation
Enrollment in school	O.R.C. § 3313.672(A)(1)	A birth certificate generally must be presented at time of initial entry into public or nonpublic school. The non-certified parent will not be able to accomplish enrollment without additional papers authorizing him/her to do so.
Medical care	O.R.C. § 2317.54 (C)	Generally a parent must give informed consent to medical treatment of their child. A parent who is not legally recognized on the child's birth certificate would not have the apparent authority to consent to medical treatment for the child. The non-certified parent will not be able to authorize care without additional papers authorizing him/her to do so.

457

14-556

OBERGEFELL

v.

HODGES

DECISION BELOW: 772 F.3d 388

LOWER COURT CASE NUMBER: 14-3057, 14-3464

QUESTION PRESENTED:

1. Whether Ohio's constitutional and statutory bans on recognition of marriages of same-sex couples validly entered in other jurisdictions violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.

2. Whether Ohio's refusal to recognize a judgment of adoption of an Ohio-born child issued to a same-sex couple by the courts of a sister state violates the Full Faith and Credit Clause of the U.S. Constitution.

CONSOLIDATED WITH 14-562, 14-571 AND 14-574 AND LIMITED TO THE FOLLOWING QUESTIONS: 1) DOES THE FOURTEENTH AMENDMENT REQUIRE A STATE TO LICENSE A MARRIAGE BETWEEN TWO PEOPLE OF THE SAME SEX? 2) DOES THE FOURTEENTH AMENDMENT REQUIRE A STATE TO RECOGNIZE A MARRIAGE BETWEEN TWO PEOPLE OF THE SAME SEX WHEN THEIR MARRIAGE WAS LAWFULLY LICENSED AND PERFORMED OUT-OF-STATE? A TOTAL OF NINETY MINUTES IS ALLOTTED FOR ORAL ARGUMENT ON QUESTION 1. A TOTAL OF

ONE HOUR IS ALLOTTED FOR ORAL ARGUMENT ON QUESTION 2. THE PARTIES ARE LIMITED TO FILING BRIEFS ON THE MERITS AND PRESENTING ORAL ARGUMENT ON THE QUESTIONS PRESENTED IN THEIR RESPECTIVE PETITIONS.

CERT. GRANTED 1/16/2015

Nos. 14-556, 14-562 and 14-574

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
FEB 27 2015
OFFICE OF THE CLERK

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL.,
PETITIONERS,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,
v.
WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL.,
PETITIONERS,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,
RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX
VOLUME II

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State Respondents and Additional Counsel for Petitioners Listed on Subsequent Pages

PETITIONS FOR WRIT OF CERTIORARI FILED NOV. 14, 2014 IN 14-556 AND 14-562 AND ON NOV. 18, 2014 IN 14-574
CERTIORARI GRANTED IN ALL CASES JANUARY 16, 2015

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Opinion, United States Court of Appeals for the Sixth Circuit, November 6, 2014 .... 1a-106a

Order, United States District Court for the Southern District of Ohio, April 14, 2014 ..... 107a-160a

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Opinion, United States Court of Appeals for the Sixth Circuit, November 6, 2014 ..... 1a-95a

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U.S. DISTRICT COURT,
MIDDLE DISTRICT OF TENNESSEE

Civil Docket For Case #: 3:13-cv-1159-AAT

TANCO, ET AL.,

v.

HASLAM, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
10/21/2013	COMPLAINT against All Defendants (Filing fee $ 400 paid), filed by Valeria Tanco. (Attachments: # 1 Civil Cover Sheet) (la) (Entered: 10/21/2013)
11/15/2013	ANSWER to 1 Complaint by Robert Cooper, Bill Gibbons, William Edward (Bill Haslam), Larry Martin (Campbell, Martha) (Entered: 11/15/2013)
11/19/2013	MOTION for Preliminary Injunction by Ijpe DeKoe, Vanessa DeVillez, Johno Espejo, Sophy Jesty, Thomas Kostura, Matthew Mansell, Kellie Miller, Valeria Tanco (Harbison, William) (Entered: 11/19/2013)
11/19/2013	MEMORANDUM in support of 29 MOTION for Preliminary Injunction filed by Ijpe DeKoe, Vanessa DeVillez,

DATE	PROCEEDINGS
	Johno Espejo, Sophy Jesty, Thomas Kostura, Matthew Mansell, Kellie Miller, Valeria Tanco (Harbison, William) (Entered: 11/19/2013)
11/19/2013	APPENDIX filed by Ijpe DeKoe, Vanessa DeVillez, Johno Espejo, Sophy Jesty, Thomas Kostura, Matthew Mansell, Kellie Miller, Valerie Tanco re 30 Memorandum in Support. (Attachments: #1 Attachment Obergefell v. Kasich, # 2 Attachment Garden State Equality v. Dow, # 3 Attachment Jones v. Hamilton Cnty Gov't, Tenn., #4 Attachment In re Lenherr's Estate, #5 Attachment Kerrigan v. Comm'r of Pub. Heath, #6 Attachment Varnum v. Brien, # 7 Attachment Dean v. District of Columbia) (Harbison, William) (Entered: 11/19/2013)
11/19/2013	NOTICE of filing by Ijpe DeKoe, Vanessa DeVillez, Johno Espejo, Sophy Jesty, Thomas Kostura, Matthew Mansell, Kellie Miller, Valerie Tanco re 29 MOTION for Preliminary Injunction (Attachments: # 1 Attachment Declaration of Valeria Tanco, # 2 Attachment Declaration of Sophy Jesty, # 3 Exhibit A to Declaration of Sophy Jesty, # 4 Exhibit B to Decalration of Sophy Jesty, # 5 Exhibit C to Declaration of Sophy Jesty, # 6 Exhibit D to Declaration of

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12/06/2013	RESPONSE in Opposition re 29 MOTION for Preliminary Injunction filed by Robert Cooper, Bill Gibbons, William Edward (Bill) Haslam, Larry Martin. (Campbell, Martha) (Entered: 12/06/2013)
12/06/2013	APPENDIX filed by All Defendants re 35 Response in Opposition to Motion. (Attachments: # 1 Attachment 1. Walker v. Mississippi, # 2 Attachment 2. Obergefell v. Kasich, # 3 Attachment 3. Andersen v. King County, # 4 Attachment 4. Donaldson v. State, # 5 Attachment 5. Planned Parenthood of Greater Texas Surgical Health Services v. Abbott) (Campbell, Martha) (Entered: 12/06/2013)

DATE	PROCEEDINGS
12/06/2013	NOTICE of Filing by Robert Cooper, Bill Gibbons, William Edward (Bill) Haslam, Larry Martin re 35 Response in Opposition to Motion Declaration of Mark Goins and Affidavit of Connie Walden (Attachments: # 1 Attachment Goins Declaration and Exhibit A, # 2 Attachment Walden Affidavit and Exhibits A & B) (Campbell, Martha) (Entered: 12/06/2013)
12/11/2013	AMICUS BRIEF filed by Family Action Council of Tennessee re 35 Response in Opposition to Motion for Preliminary Injunction. (hb) Modified text on 12/11/2013 (hb). (Entered: 12/11/2013)
12/20/2013	REPLY to Response to Motion re 29 MOTION for Preliminary Injunction filed by Ijpe DeKoe, Vanessa DeVillez, Johno Espejo, Sophy Jesty, Thomas Kostura, Matthew Mansell, Kellie Miller, Valeria Tanco. (Hickman, Scott) (Entered: 12/20/2013)
12/20/2013	APPENDIX filed by All Plaintiffs re 46 Reply to Response to Motion. (Attachments: #1 Attachment 1996 Tenn Pub Acts 1031, # 2 Attachment Lindsley v Lindsley, # 3 Attachment Bowser v Bowser, # 4 Attachment Stoner v Stoner, # 5 Attachment Payne v Payne, # 6 Attachment Ochalek v Richmond, # 7 Attachment Baker v Nelson, # 8 Attachment Brief of

DATE	PROCEEDINGS
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03/14/2014	MEMORANDUM. Signed by District Judge Aleta A. Trauger on 3/14/14. (xc:Pro se party by regular and certified mail.)(DOCKET TEXT SUMMARY ONLY-ATTORNEYS MUST OPEN THE PDF AND READ THE ORDER.)(dt) (Entered: 03/14/2014)
03/14/2014	ORDER: For the reasons set forth in the accompanying Memorandum, the plaintiffs' Motion for Preliminary Injunction 29 is hereby GRANTED. The plaintiffs did not submit a proposed preliminary injunction order for the court's consideration. There, the court has prepared and hereby ISSUES the accompanying Preliminary Injunction, which tracks the language of the relief requested in the plaintiffs' motion itself. (See Docket No. 29 at p. 3.) If either side believes the language of the injunction should be modified, it may a file a motion for the courts consideration. Signed by District Judge Aleta A. Trauger on 3/14/14. (dt) (Entered: 03/14/2014)

DATE	PROCEEDINGS
03/14/2014	PRELIMINARY INJUNCTION. Signed by District Judge Aleta A. Trauger on 3/14/14. (DOCKET TEXT SUMMARY ONLY-ATTORNEYS MUST OPEN THE PDF AND READ THE ORDER.)(dt) (Entered: 03/14/2014)
03/18/2014	MOTION to Stay re 69 Preliminary Injunction, 67 Memorandum Opinion of the Court, 68 Order on Motion for Preliminary Injunction,, Pending Appeal by Robert Cooper, William Edward (Bill) Haslam, Larry Martin. (Campbell, Martha) (Entered: 03/18/2014)
03/18/2014	MEMORANDUM in Support of 72 MOTION to Stay re 69 Preliminary Injunction,, Pending Appeal filed by Robert Cooper, William Edward (Bill) Haslam, Larry Martin . (Attachments: # 1 Attachment Herbert v. Kitchen order, # 2 Attachment Bishop v. Holder order)(Campbell, Martha) (Entered: 03/18/2014)
03/18/2014	NOTICE OF APPEAL as to 69 Preliminary Injunction, 67 Memorandum Opinion of the Court, 68 Order on Motion for Preliminary Injunction,, by Robert Cooper, William Edward (Bill) Haslam, Larry Martin. (Campbell, Martha) (Entered: 03/18/2014)

DATE	PROCEEDINGS
03/19/2014	USCA Case Number 14-5297 for 74 Notice of Appeal filed by Larry Martin, William Edward (Bill) Haslam, Robert Cooper. Jill Colyer is Case Manager. (dt) (Entered: 03/19/2014)
03/19/2014	RESPONSE in Opposition re 72 MOTION to Stay re 69 Preliminary Injunction, 67 Memorandum Opinion of the Court, 68 Order on Motion for Preliminary Injunction,, Pending Appeal filed by Ijpe DeKoe, Johno Espejo, Sophy Jesty, Thomas Kostura, Matthew Mansell, Valeria Tanco. (Hickman, Scott) (Entered: 03/19/2014)
03/20/2014	MEMORANDUM & ORDER: Therefore, for the reasons stated herein, the Motion to Stay is hereby DENIED. It is so ORDERED. Signed by District Judge Aleta A. Trauger on 3/20/14. (DOCKET TEXT SUMMARY ONLY-ATTORNEYS MUST OPEN THE PDF AND READ THE ORDER.) (tmw) (Entered: 03/20/2014)
04/25/2014	ORDER of USCA: Defendants' motion to stay the district court's order is GRANTED, and this case shall be assigned to a merits panel without delay.(dt) (Entered: 04/25/2014)
11/06/2014	INFORMATION COPY from 6CCA: THIS CAUSE was heard on the record from the district court and was argued by counsel. IN CONSIDERATION

DATE	PROCEEDINGS
	WHEREOF, it is ORDERED that the judgment of the district court is REVERSED. (MANDATE TO ISSUE) (af) (ENTERED: 11/06/2014)
01/20/2015	SUPREME COURT NOTICE to U.S. Sixth Circuit Court of Appeals re Notice of Appeal. (ds) (ENTERED: 01/20/2015)

U.S COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals Docket #: 14-5297

TANCO, ET AL.,

v.

HASLAM, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
03/19/2014	Civil Case Docketed. Notice filed by Appellants Robert Cooper, William Edward "Bill" Haslam and Larry Martin. Transcript needed: n. (JC)
03/25/2014	MOTION filed by Ms. Martha A. Campbell for Robert Cooper, Larry Martin and William Edward "Bill" Haslam to stay district court order. Certificate of Service: 03/25/2014. (MAC)
04/04/2014	RESPONSE in opposition filed regarding a motion stay district court order, ; previously filed by Ms. Martha A. Campbell in 14-5297. Response from Attorney Mr. J. Scott Hickman for Appellees Valeria Tanco, Sophie Jesty, Ijpe DeKoe, Thomas Kostura, Johno Espejo and Matthew Mansell

DATE	PROCEEDINGS
	Certificate of Service:04/04/2014. (JSH)
04/25/2014	Per Curiam OPINION filed granting motion stay district court order filed by Ms. Martha A. Campbell., decision not for publication. This case shall be assigned to a merits panel without delay. Ralph B. Guy , Jr., Circuit Judge; Eric L. Clay, Circuit Judge and William O. Bertelsman, U.S. District Judge for the Eastern District of Kentucky. (JC)
05/07/2014	APPELLANT BRIEF filed by Ms. Martha A. Campbell for Robert Cooper, Larry Martin and William Edward "Bill" Haslam. Certificate of Service:05/07/2014. Argument Request: requested. (MAC)
06/09/2014	APPELLEE BRIEF filed by Mr. William L. Harbison for Valeria Tanco, Sophie Jesty, Ijpe DeKoe, Thomas Kostura, Johno Espejo and Matthew Mansell. Certificate of Service: 06/09/2014. Argument Request: requested. (COUNSEL TO REFILE BRIEF WITH ATTACHMENT)—[Edited 06/10/2014 by CB] (WLH)
06/09/2014	FILED: Appendix of Unpublished Cases Filed in Support of the Brief of Plaintiffs-Appellees by Mr. William L. Harbison for Valeria Tanco, Sophie Jesty, Ijpe DeKoe, Thomas Kostura,

DATE	PROCEEDINGS
	Johno Espejo and Matthew Mansell. Certificate of Service: 06/09/2014. (COUNSEL TO ATTACH THIS DOCUMENT TO BRIEF AND REFILE)—[Edited 06/10/2014 by CB] (WLH)
06/10/2014	CORRECTED Brief of Plaintiffs-Appellees BRIEF filed by Mr. William L. Harbison for Valeria Tanco, Sophie Jesty, Ijpe DeKoe, Thomas Kostura, Johno Espejo and Matthew Mansell. Certificate of Service:06/10/2014. Argument Request: requested. (WLH)
06/26/2014	REPLY BRIEF filed by Attorney Ms. Martha A. Campbell for Appellants Robert Cooper, Larry Martin andWilliam Edward "Bill" Haslam. Certificate of Service:06/26/2014. (MAC)
08/06/2014	CAUSE ARGUED by Mr. Joseph Frederick Whalen, III for Appellants Robert Cooper, Larry Martin and William Edward Bill Haslam, by Mr. William L. Harbison for Appellees Valeria Tanco, Sophie Jesty, Ijpe DeKoe, Thomas Kostura, Johno Espejo and Matthew Mansell, before Daughtrey, Circuit Judge; Sutton, Circuit Judge and Cook, Circuit Judge. (MCP)
11/06/2014	OPINION and JUDGMENT filed : The judgment of the district court is

DATE	PROCEEDINGS
	REVERSED. Decision for publication. Martha Craig Daughtrey (DISSENTING), Jeffrey S. Sutton (AUTHORING), and Deborah L. Cook, Circuit Judges. (CL)
11/20/2014	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee Valeria Tanco. Supreme Court Case No:14-562, 11/14/2014. (CL)
1/20/2015	U.S. Supreme Court letter filed granting the petition for a writ of certiorari limited to the following questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state? Supreme Court Case No: 14-562, 01/20/2015.. (CL)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Filed: 10/21/13]

Case No. 3:13-cv-01159

VALERIA TANCO and SOPHY JESTY,
IJPE DEKOE and THOMAS KOSTURA,
KELLIE MILLER and VANESSA DEVILLEZ, and JOHNO ESPEJO and MATTHEW MANSELL,

Plaintiffs,

v.

WILLIAM EDWARD "BILL" HASLAM, as Governor of the State of Tennessee, in his official capacity;
BILL GIBBONS, as Commissioner of the Department of Safety and Homeland Security, in his official capacity; and LARRY MARTIN, as Commissioner of the Department of Finance and Administration, in his official capacity, and ROBERT COOPER, as Attorney General & Reporter of the State of Tennessee, in his official capacity,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs bring this action to challenge the constitutionality of Article XI, section 18 of the Tennessee Constitution (hereinafter, the "DOMA Amendment") and Tennessee Code Ann. § 36-3-113 (collectively, the "Anti-Recognition Laws"). The Anti-

Recognition Laws prohibit the State of Tennessee from recognizing the marriages of same-sex couples lawfully entered into in other jurisdictions. The challenged provisions single out the marriages of same-sex couples and exempt them from Tennessee's long-standing rule that "'a marriage valid where celebrated is valid everywhere.'" *Farnham v. Farnham*, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (quoting *Pennegar v. State*, 10 S.W. 305, 306 (Tenn. 1888)). Tennessee's categorical refusal to recognize the valid out-of-state marriages of same-sex couples has no reasonable or rational basis or justification and violates multiple guarantees of the Constitution of the United States. This Court should so declare and issue an injunction requiring Tennessee state officials to recognize the marriages of same-sex couples on an equal basis as the marriages of opposite-sex couples.

2. Plaintiffs are married same-sex couples who moved to Tennessee to pursue their livelihoods and make new homes for themselves and their families after they legally married in another state. If the Plaintiffs were opposite-sex couples in exactly the same situation, there would be no question that the State of Tennessee would respect their marriages and treat them as spouses for all purposes under state law—even if their marriages could not have been originally celebrated in this state for some legal reason. Solely because each Plaintiff is married to a spouse of the same sex, however, Tennessee applies a different rule and treats their marriages as a legal nullity.

3. Plaintiffs come from various walks of life and occupations and include a full-time Army reservist, a student pursuing a Master of Fine Arts degree, two professors of veterinary medicine, employees of

various businesses, and parents raising minor children. They are all tax-paying citizens actively involved in their communities and have been in committed relationships with their respective spouses for many years. They now are each *married* couples, having entered into valid marriages in other states before moving to Tennessee. The familial status granted by virtue of their marriages, as authorized and recognized by their former states of residence, is of immense personal importance to them and is a status in which they have a protected liberty and property interest under the Due Process Clause of the Fourteenth Amendment to the United States. *United States v. Windsor,* 133 S. Ct. 2675, 2692 (2013).

4. The Plaintiff couples have cared for one another, devoted their lives to support each other, sacrificed for each other and their families, and made plans for the future with each other. Some of the Plaintiffs own homes in Tennessee. Some are raising or expecting children together. The situations faced by these couples are similar to those faced by other married same-sex couples in the State of Tennessee who are being denied the basic rights that are afforded by marriage—rights that were available to them in the states in which they entered into valid legal marriages, but are denied them now that they have relocated to Tennessee.

5. Tennessee's refusal to recognize same-sex couples' valid out-of-state marriages divests them of "a dignity and status of immense import" that they previously obtained by marrying. *Windsor*, 133 S. Ct. at 2692. By denying recognition to Plaintiffs' otherwise valid marriages in this manner, Tennessee "instructs all [state] officials, and indeed all persons with whom same-sex couples interact, including their

own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696. Tennessee's relegation of lawfully married same-sex couples and their children to this inferior status constitutes "a deprivation of the liberty of the person," *id.* at 2695, in violation of the Fourteenth Amendment. Because the Constitution "withdraws from Government the power to degrade or demean in the way this law does," *id.*, Tennessee's Anti-Recognition Laws are unconstitutional to the extent they deny equal legal recognition to marriages of same-sex couples validly celebrated in other jurisdictions.

6. Tennessee's refusal to respect Plaintiffs' legal marriages also undermines their financial security and deprives them of important legal rights and protections, as well as mutual responsibilities they wish to assume. Although Plaintiffs legally became family under the laws of other states, Tennessee law refuses to see them as family and instead impermissibly treats Plaintiffs and other married same-sex couples as complete "stranger[s] to [the state's] law." *Romer v. Evans*, 517 U.S. 620, 635 (1996). Plaintiffs and other married same-sex couples are denied all protections, benefits, and obligations that Tennessee law affords to all other Tennessee residents who entered into valid marriages outside Tennessee. For example, married same-sex couples and their children are not treated equally under Tennessee's intestacy laws if one spouse dies without a valid will. Similarly, the surviving spouse may face serious economic distress because she is denied the current State inheritance tax exemption and has no right to sue if the spouse died as a result of a tragic accident, both of which are available to opposite-sex spouses. In addition, children born to same-sex married couples are denied the statutory presumption that both spouses

are the legal parents of the child—something other married couples may take for granted. Married same-sex couples are thus denied critical protections that state law provides as a safety net for other married couples.

7. Tennessee's refusal to respect the valid out-of-state marriages of same-sex couples also violates the Due Process and Equal Protection Clauses because it deprives them of protected liberty and property interests in their extant marital relationships, impermissibly burdens the fundamental right to marry, discriminates based on sex and sexual orientation, and impermissibly burdens the fundamental right to travel between the states by treating same-sex spouses as though they were legal strangers. Tennessee's discriminatory marriage recognition laws, therefore, warrant application of heightened scrutiny under the Fourteenth Amendment. However, because they do not rationally advance *any* legitimate government interest, they cannot withstand any level of judicial scrutiny. *Stemler v. City of Florence,* 126 F.3d 856, 873-74 (6th Cir. 1997). Tennessee's refusal to respect the valid marriages of same-sex couples does not promote any legitmate policy objective, but serves only to demean and harm same-sex couples and their children.

8. Plaintiffs bring this action for declaratory and injunctive relief against Defendants pursuant to 42 U.S.C. § 1983, Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201 and 2202. Plaintiffs seek (1) a declaration that Tennessee's refusal to respect the marriages of same-sex couples validly celebrated in other jurisdictions violates the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment of

the United States Constitution, and (2) an injunction requiring Defendants to fully recognize the marriages of Plaintiffs and other same-sex couples validly celebrated in other jurisdictions, and to treat those marriages the same in all respects as marriages of opposite-sex couples validly celebrated in other jurisdictions.

THE PARTIES

9. Drs. Valeria Tanco and Sophy Jesty are Professors of "Veterinary Medicine at the University of Tennessee and reside in Knoxville. While residing in the State of New York, they were legally married in that state on September 9, 2011, and subsequently moved to Tennessee to accept offers of employment. They wish to have their marriage recognized in the State of Tennessee and have been harmed by Tennessee's denial of recognition of their marriage. Drs. Tanco and Jesty are expecting their first child in Spring 2014.

10. Plaintiffs Sergeant First Class Ijpe DeKoe and Thomas Kostura are residents of Memphis, Tennessee. They were validly married in the State of New York August 4, 2011, while Mr. Kostura was a resident of that State and Sergeant DeKoe was stationed in the State of New Jersey. After Sergeant DeKoe returned from a tour of duty in Afghanistan, the couple moved to Tennessee together. They wish to have their marriage recognized in the State of Tennessee and have been harmed by Tennessee's refusal to recognize their marriage.

11. Plaintiffs Kellie Miller and Vanessa DeVillez are residents of Greenbrier, Tennessee, within this District. They were validly married in the State of New York on July 24, 2011 while residing in New

Jersey. They subsequently moved back to Tennessee, where Ms. Miller had previously resided. They wish to have their marriage recognized in the State of Tennessee and have been harmed by Tennessee's refusal to recognize their marriage.

12. Plaintiffs Johno Espejo[1] and Matthew Mansell are residents of Franklin, Tennessee, also within this District. They were validly married in the State of California on August 5, 2008, while residing in California, and subsequently moved to Tennessee when Mr. Mansell's employer transferred his position to this state. They wish to have their marriage recognized in the State of Tennessee and have been harmed by Tennessee's refusal to recognize their marriage.

13. Defendant William Edwards "Bill" Haslam is Governor of the State of Tennessee. Article III, Section 10 of the Tennessee Constitution requires the governor to "take care that the laws be faithfully executed." He is responsible for upholding and ensuring compliance with the state constitution and statutes prescribed by the legislature, including the Anti-Recognition Laws. Governor Haslam also bears the authority and responsibility for the formulation and administration of the policies of the executive branch, including administrative agency policies relating to health insurance coverage, taxation, state employee benefits, and regulation of health professions (including, for example, implementation of laws governing medical decision-making by family members), all of which involve recognizing marital status. Governor Haslam is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint. Governor Haslam's

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[1] Johno's legal name is Joy Espejo.

official residence is in Nashville, Tennessee, within the Middle District. He is sued in his official capacity.

14. Defendant Bill Gibbons is Commissioner of the Department of Safety and Homeland Security. The Driver Control Division is the division of the Department of Safety and Homeland Security that operates the Driver Services Centers throughout the State of Tennessee. In his official capacity, Commissioner Gibbons is responsible for overseeing the issuance of driver's licenses in Tennessee, including the development and enforcement of policies and procedures for updating those records to reflect a Tennessee resident's marriage. Commissioner Gibbons is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint. He is sued in his official capacity.

15. Defendant Larry Martin is Commissioner of the Department of Finance and Administration, which includes the Division of Benefits Administration that oversees the State of Tennessee Group Insurance Plan. In his official capacity, Commissioner Martin is the Chairman of the State Insurance Committee, which has the authority to change the benefits and eligibility requirements for the State of Tennessee Group Insurance Plan. Commissioner Martin is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint. He is sued in his official capacity.

16. Defendant Robert Cooper is the Attorney General & Reporter of the State of Tennessee. He is sued in his official capacity because the constitutionality of the Anti-Recognition Laws is challenged in this case.

JURISDICTION AND VENUE

17. Plaintiffs bring this action under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 to redress the deprivation under color of state law of rights secured by the United States Constitution.

18. This Court has jurisdiction of the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under the Constitution and laws of the United States. This Court has personal jurisdiction over Plaintiffs and Defendants.

19. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because one or more Defendants reside and/or work in this District and all Defendants reside in this State, and because a substantial part of the acts and events giving rise to this Complaint occurred in this District.

20. This Court has authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §§ 2201 and 2202.

FACTUAL BACKGROUND

Tennessee's recognition of marriages of opposite-sex couples validly celebrated in other jurisdictions

21. Tennessee law provides that a marriage validly celebrated under the laws of another jurisdiction will be recognized in Tennessee even if that marriage could not lawfully have been celebrated within this state. Tennessee courts have long recognized and continue to recognize the rule that "'a marriage valid where celebrated is valid everywhere.'" *Farnham v.*

Farnham, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009) (quoting *Pennegar v. State*, 10 S.W. 305, 306 (Tenn. 1888)). Applying this rule, Tennessee courts have recognized as valid: (1) marriages celebrated in and valid under the law of another state, even though those marriages are bigamous and would be regarded as void and contrary to public policy if celebrated in Tennessee, *Farnham, 323 S. W 2d* at 140; (2) marriages validly contracted in another state by parties who do not satisfy the statutory minimum age qualifications to marry under Tennessee law and therefore could not have obtained a license to marry in Tennessee, *Keith v. Pack*, 187 S.W.2d 618, 619 (Tenn. 1945); and (3) common-law marriages entered into in another state and valid under the law of that state, even though Tennessee law does not provide for couples to enter into common-law marriages within the state, *Shelby County v. Williams,* 510 S.W.2d 73, 74 (Tenn. 1974); *In re Estate of Glover*, 882 S.W.2d 789, 789-90 (Tenn. Ct. App. 1994); *Lightsey v. Lightsey*, 407 S.W.2d 684, 690 (Tenn. Ct. App. 1966).

22. With respect to marriages of opposite-sex couples, Tennessee denies recognition to out-of-state marriages only when such marriages violate principles of Tennessee public policy so strongly that the parties to the relationship would be subject to criminal prosecution in this state. Only in such extreme circumstances have Tennessee courts concluded that marriages lawfully contracted in another state must be regarded as void. *See, e.g., Rhodes v. McAfee*, 457 S.W.2d 522, 524 (Tenn. 1970) (holding that out-of-state marriage between stepfather and stepdaughter following stepfather's divorce from mother was void where such marriage could be prosecuted as a felony in Tennessee). Tennessee law imposes no such criminal sanctions on Plaintiffs' marriages, nor could it do

so without violating both the federal Constitution and the Tennessee Constitution. *See Lawrence v. Texas*, 539 U.S. 558 (2003); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. App. 1996).

Tennessee's refusal to respect the legal marriages of same-sex couples validly celebrated in other jurisdictions

23. Despite Tennessee's liberal recognition of marriages celebrated under the laws of other jurisdictions, Tennessee has enacted a state constitutional amendment and statutes creating a specific exception to that rule only for legally married same-sex couples. The DOMA Amendment, codified as Article XI, section 18 of the Tennessee Constitution, provides:

> The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

24. Likewise, Tennessee Code Annotated section 36-3-113 provides:

> (a) Tennessee's marriage licensing laws reinforce, carry forward, and make explicit the

long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society. To that end, it is further the public policy of this state that the historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state in order to provide the unique and exclusive rights and privileges to marriage.

(b) The legal union in matrimony of only one (1) man and one (1) woman shall be the only recognized marriage in this state.

(c) Any policy, law or judicial interpretation that purports to define marriage as anything other than the historical institution and legal contract between one (1) man and one (1) woman is contrary to the public policy of Tennessee.

(d) If another state or foreign jurisdiction issues a license for persons to marry, which marriages are prohibited in this state, any such marriage shall be void and unenforceable in this state.[2]

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[2] Notwithstanding the general wording of this provision, the purpose and effect of Tenn. Code Ann. 36-3-113(d) is to deny recognition *only* to the marriages of same-sex couples. Even after the enactment of this provision, Tennessee continues to recognize marriages that were legal where enacted, but that are prohibited in Tennessee, and Tennessee courts continue to apply the longstanding rule that that Tennessee generally recognizes out-of-state marriages of opposite-sex couples even when those marriages could not have been entered into in Tennessee. *See,*

25. By singling out the marriages of same-sex couples, and only those marriages, for express and complete denial of recognition under Tennessee law, the Anti-Recognition Laws demonstrate that they are rooted in animus toward gay, lesbian and bisexual persons and same-sex couples. Indeed, the language of these provisions, on their face, reflects that that they were intended to subject the valid marriages of same-sex couples to different—and unequal—treatment in order to send a message that same-sex relationships are inferior, and the laws deprive married .same-sex couples of the many protections and benefits available to other married couples under state law.

Harms caused by Tennessee's refusal to respect marriages of same-sex couples validly celebrated in other jurisdictions

26. Same-sex couples and their children, including the Plaintiffs, are harmed in numerous ways by Tennessee's refusal to respect their legal marriages celebrated in other jurisdictions.

27. Marriage plays a unique and central personal, social, legal, and economic role in American and Tennessee society. Being married reflects the commitment that a couple makes to one another, as well as representing a public acknowledgement of the depth and permanence of the married couple's private relationship. Marriage is also the sole legal institution in Tennessee through which couples can create a family unit that the state comprehensively recognizes and protects, and that third parties are required to recognize and respect. Without the protection of being recognized as legally married, the state treats even

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e.g., Farnham v. Farnham, 323 S.W.3d 129, 134 (Tenn. Ct. App. 2009).

long-term committed partners as legal strangers to one another, and third parties are permitted and in some cases legally required to do so as well.

28. Denial to same-sex couples of the status of being married in the eyes of the state despite their having previously entered into a legal marriage in another jurisdiction conveys the state's view that the couple's marriage is of lesser value and unworthy of legal recognition and support. This public rejection of married same-sex couples' familial relationship, including the legal relationships of these married Plaintiffs, damages them and their children by facilitating and encouraging both public and private discrimination, by stripping them of privacy and dignity, and by stigmatizing their relationships and families as inferior to those of opposite-sex married couples and their families.

29. Tennessee provides a broad array of statutory protections, benefits, and mutual responsibilities for couples recognized as married under state law. The exclusion of same-sex couples like the Plaintiffs from these protections causes numerous tangible harms to married same-sex couples. Such couples are denied the public and private safety net that attaches to marriage and the ability to legally join their lives together and be treated as a family unit by the government and by other people. The harms to Plaintiffs and other same-sex couples from Tennessee's refusal to respect their marriages include the following, among others:

a. Tennessee imposes a duty to support one's opposite-sex spouse financially if the spouse cannot be self-supporting. Tenn. Code Ann. § 39-15-101. There is no support obligation for same-sex spouses.

b. A married person is exempt from inheritance tax on property left to him or her by an opposite-sex spouse, including the spouse's share of the couple's home, and thus, protected against economic distress or loss of a home because of an estate tax bill. Tenn. Code Ann. § 67-8-315(a)(6). A same-sex surviving spouse or partner is denied this exemption and must pay a graduated tax of up to 9.5% for a non-exempt estate, the same rate that would apply to non-family members. Tenn. Code Ann. § 67-8-314.

c. Communications between opposite-sex spouses enjoy evidentiary privileges in both civil and criminal proceedings, and an opposite-sex spouse may not be compelled to testify against his or her spouse over that spouses' objection except in limited circumstances. Tenn. Code Ann. § 24-1-201. Confidential communications between same-sex spouses are afforded no privilege or immunity.

d. An opposite-sex spouse is given priority in consideration for appointment as conservator for a spouse who is in need of a conservator. Tenn. Code Ann. § 34-3-103. A same-sex spouse receives no such priority.

e. An opposite-sex spouse or surviving spouse of a veteran receives a preference when applying for certain state jobs. A same-sex spouse or surviving spouse of a veteran receives no such preference. Tenn. Code Ann. § 8-30-307 (c).

f. A widow or widower of an opposite-sex spouse is entitled to his or her deceased spouse's estate if the spouse died without a will. Tenn. Code Ann. § 31-2-104. A same-sex surviving spouse or partner in this situation receives nothing.

g. A child born to a married opposite-sex couple is deemed to be the child of both spouses. Tenn. Code Ann. §§ 68-3-305, -306. A child born to a same-sex couple is denied that immediate legal bond with both parents. This also deprives the child of the right of intestate succession to the estate of the parent who is not considered legally related to him or her. Tenn. Code Ann. § 31-2104. Moreover, that parent is denied many rights commonly afforded to parents such as authority to consent to emergency medical treatment or obtain a social security card and passport for the child. The denial of these protections leaves married same-sex couples and their children highly vulnerable in the event that one parent dies or is unable to care for the child.

h. Under the Tennessee Workers Compensation Law, the opposite-sex spouse of someone who dies as a result of a work-related injury is entitled to damages and may bring suit to enforce such rights. Tenn. Code Ann. § 50-6-210. Same-sex spouses or partners have no legal standing to sue as a result of their spouse's workplace injury.

i. An opposite-sex spouse may bring a suit for the wrongful death of his or her spouse, Tenn. Code Ann. § 20-5-110, and an opposite-sex

spouse's right to prosecute such action is superior to any right held by the personal representative of the deceased, Tenn. Code Ann. § 20-5-107. A same-sex spouse has no legal standing to prosecute or participate in such claims.

j. The surviving opposite-sex spouse of a member of the Tennessee Army National Guard or the Tennessee Air National Guard who has been killed in the line of duty may continue existing participation at a subsidized rate in a group health insurance plan sponsored by a local government. Tenn. Code Ann. § 8-27-207. This benefit is not available to a same-sex surviving spouse.

k. Property tax deferral for persons over the age of 65, once granted, is extended until the death of an opposite-sex spouse. Tenn. Code Ann. § 7-64-101 *et seq.* Deferral is not available to a surviving same-sex spouse.

l. An opposite-sex spouse of a member of the armed forces who is stationed outside the State is allowed to cast an absentee ballot under the procedures and benefits outlined in Tenn. Code Ann. § 2-6-502. This right is not granted to a same-sex spouse.

m. An opposite-sex spouse who adopts a married name on their marriage license can use that document to change their surname on their Tennessee driver's license. Tenn. Comp. R. & Regs. 1340-01-13-.12. A same-sex spouse must obtain court-ordered name change, which is both costly and time consuming.

30. As a result of Defendants' actions, Plaintiffs have been denied the hundreds of tangible legal rights and benefits of having their legal out-of-state marriages recognized under Tennessee law as well as the legal status, personal security and stability, financial benefits, privacy, social recognition, and equal dignity that marriage confers on married couples and their families. Additionally, Tennessee's denial of recognition to Plaintiffs' valid out-of-state marriages has harmed them in specific ways as further described below.

Drs. Valeria Tanco and Sophy Jesty

31. Drs. Tanco and Jesty (hereafter, "Valeria and Sophy") first met by chance in an elevator in September 2009 while they were graduate students in the College of Veterinary Medicine at Cornell University in Ithaca, New York. They started dating in 2010, and have been in love and committed to one another ever since.

32. Valeria and Sophy entered into a valid marriage in the State of New York on September 9, 2011.

33. After Sophy completed her post-graduate fellowship in cardiac regenerative medicine at Cornell, they decided to look for jobs that were geographically close to one another so that they could live together, a difficult proposition for two aspiring university-level teachers. The University of Tennessee's College of Veterinary Medicine offered them that opportunity, and they accepted it readily. Sophy is an Assistant Professor in the Department of Small Animal Clinical Sciences, and Valeria is a Clinical Assistant Professor in Small Animal Reproductive Medicine.

34. Tennessee's refusal to recognize their marriage has harmed Valeria and Sophy and will continue to do

so if not remedied by this Court. In addition to the harms described above, Tennessee's denial of recognition for the valid out-of-state marriages of same-sex couples has caused Valeria and Sophy to suffer the following additional specific harms.

35. In June 2012, Valeria and Sophy, like so many other married couples, decided to have a child together, and began trying to conceive a child through assisted reproduction. On July 10, 2013, they were thrilled to learn that Valeria is pregnant with their first child, who is due to be born in spring 2014. According to the laws of Tennessee, opposite-sex married couples who conceive a child using alternative insemination are able to take advantage of the statutory presumption that both spouses are the parents of a child born during a marriage. Tenn. Code Ann. § 68-3-306. Opposite-sex married couples therefore are not required to take any additional steps in order to obtain legal recognition for both of them as the parents of the child they decided to have together. Because the State of Tennessee does not recognize Valeria and Sophy's marriage, however, Sophy cannot benefit from that marital presumption. If they are not able to use any such steps to confirm that both are the legal parents of the child, Sophy will lack legal recognition as a parent of her own child—a status that automatically would be granted to any opposite-sex spouse immediately upon the child's birth. The lack of automatic legal recognition that Sophy is a parent of her and Valeria's own child exposes the couple and their child to unacceptable risks and deprives them of a host of critical legal protections should any health emergencies or other problems arise during or shortly after the birth of their child.

36. In preparation for the birth of their child, Valeria and Sophy also sought to enroll themselves in a family plan through the health insurance plans of their employer, the University of Tennessee. On September 12, 2013, Valeria and Sophy emailed Robert Chance, the Director of Payroll at the University of Tennessee, Knoxville, whose office administers the health plan for campus employees. In their email, they sought to clarify whether they were permitted to make that change during the open enrollment period because they are legally married. That same day, Mr. Chance replied that the campus participates in the State of Tennessee's Group Health Insurance plan which defines a spouse as: "Your spouse (legally married) – Article VI, section 18 of the Tennessee Constitution provides that a marriage from another state that does not constitute the marriage of one man and one woman is 'void and unenforceable in this state.'" Consequently, Mr. Chance concluded, "based on this quote from the [benefits] guide, you all will need to remain in your individual coverage"—which means paying for two separate policies.

37. Valeria and Sophy purchased a home originally deeded in both of their names as "tenants in common for life with the remainder to the survivor in fee." Under that form of title, Tennessee law considers Valeria and Sophy to be two legal strangers who happen to own a house together. In the event that one of them dies, the other would inherit the remaining fifty percent of the house and would be taxed accordingly. In contrast, Tennessee permits opposite-sex married couples to hold title to property as tenants by the entirety, a form of ownership that allows both spouses to individually own the entire property. When one of them dies, the other automatically becomes the owner of the property and is not required to pay any

taxes or fees. Seeking to obtain the significant benefits associated with tenancy by the entirety, Valeria and Sophy attempted to record a corrected deed indicating that they hold the property as tenants by the entirety. The Knox County Register of Deeds recorded the document, but, unlike other married couples, Valeria and Sophy do not have the security of knowing that this deed will be recognized as valid should one of them die. Being unable to hold title as tenants by the entirety has significant negative tax and probate consequences that are not imposed on opposite-sex married couples. Valeria and Sophy are entitled to a declaration that the State of Tennessee may not constitutionally deny them the right to jointly own property as tenants by the entirety, just as any other married couple may do.

Ijpe DeKoe and Thomas Kostura

38. Sergeant First Class DeKoe and Mr. Kostura (hereafter "Ijpe and Thom") met at camp when they were both teenagers, maintaining a close friendship for over a decade until March 2011 when they decided to start dating as adults. At the time, Ijpe was living in Memphis, Tennessee, and Thom in East Hampton, New York.

39. In late summer 2011, Ijpe, a full-time reservist with the Army Reserves, received orders to deploy to Afghanistan. Before Ijpe's departure, Ijpe and Thom married in New York on August 4, 2011. A week later, Ijpe touched down in Afghanistan to start his nearly yearlong deployment.

40. Ijpe returned from Afghanistan in May 2012 and moved with Thom to Memphis. From the day they arrived in Tennessee until early September 2013,

their relationship enjoyed none of the benefits automatically given to married couples, despite their having been legally married in New York. According to the State of Tennessee and the federal government, their relationship did not exist. For their first year in Memphis, Ijpe continued to work for the United States Army Reserves in Memphis. During that time Thom worked while he applied to the Master of Fine Arts program at the Memphis College of Fine Arts. Thom was accepted into the program and started classes in August 2013.

41. On September 3, 2013, the United States Department of Defense began respecting Ijpe and Thom's marriage, consistent with the Supreme Court's ruling in *Windsor v. United States*. As a result, Thom is now covered by Ijpe's health insurance, permitted to enter the base, and allowed to access the many services offered to the spouses of members of the military. Although the military now fully respects Ijpe and Thom's marriage, the State of Tennessee treats their marriage as a legal nullity the moment they step off the base.

42. As described above, Ijpe and Thom, and their relationship, have been relegated to a second-class status. Like other legally married couples, Ijpe and Thom want the assurance of knowing that their marriage will be respected by state officials and third parties, and that they will be treated equally under the law to other married couples. The daily injury and stigma of being treated unequally and having their legal marriage treated as a nullity in their home state are particularly painful for Ijpe, who has dedicated his life to protecting the very values of liberty and equal protection that Tennessee denies him, Thom, and their family.

43. Tennessee's refusal to recognize Ijpe and Thom's marriage has harmed them and will continue to do so if not remedied by this Court.

Kellie Miller and Vanessa DeVillez

44. Ms. Miller and Ms. DeVillez (hereafter "Kellie and Vanessa") met nearly ten years ago, like so many other modern couples, through an online dating website. After a month of communicating via email, they decided to meet in person and have been in love ever since.

45. At the time, Kellie moved from Tennessee to live with Vanessa in New Jersey.

46. Kellie and Vanessa married on July 24, 2011, in New York. On their marriage certificate, they each changed their last names to a hyphenated last name, marking the beginning of their new family.

47. In fall 2012, the couple decided to move back to Tennessee. They bought a house in Greenbrier in November, and a few months later, Kellie returned to work for her old employer, who welcomed her back.

48. Tennessee's refusal to recognize Kellie and Vanessa's marriage has harmed them and will continue to do so if not remedied by this Court. In addition to the harms described above, Tennessee's denial of recognition to the valid out-of-state marriages of same-sex couples has caused Kellie and Vanessa to suffer the following additional specific harms.

49. When Kellie and Vanessa first bought their home in Greenbrier, it was deeded to them as "tenants in common with the right of survivorship." The couple recorded a new quitclaim deed re-deeding the property

to themselves as "tenants by the entirety" in recognition of their marriage. Robertson County Recorder Frankie Fletcher accepted the deed for recording, but its validity remains at issue. The validity of Kellie and Vanessa's deed has significant legal consequences, and unlike other married couples, Kellie and Vanessa do not have the security of knowing that this deed will be recognized as valid should one of them die. Kellie and Vanessa are entitled to a declaration that the State of Tennessee may not constitutionally deny them the right to jointly own property as tenants by the entirety, just as any opposite-sex married couple may do.

50. In October 2013, Kellie went to the local Driver Services Center in Springfield, Tennessee. She applied to correct the last name on her driver's license to reflect the hyphenated last name she took when she and Vanessa got legally married. According to Tennessee Regulations § 1340-01-13-.12, Tennessee residents are permitted to change their name on their license using an original or certified copy of their marriage certificate upon payment of a nominal duplication fee. After providing the appropriate documentation and necessary payment, Kellie was informed by an employee of the Driver Services Center that she could not use her marriage certificate to obtain a driver's license with her married name because the State of Tennessee does not recognize marriages of same-sex couples.

51. In October 2013, Vanessa also went to the Drivers Services Center to obtain a Tennessee Driver's License with her married name. She too provided the required documentation and payment, but was informed by an employee of the Driver Services Center that she could not use her marriage certificate to

obtain a driver's license with her married name because the State of Tennessee does not recognize marriages of same-sex couples.

Johno Espejo and Matthew Mansell

52. Mr. Espejo and Mr. Mansell (hereafter "Johno and Matt") have been in a committed relationship for more than 18 years and legally married on August 5, 2008, while they were living in California.

53. Several years before Johno and Matt married, while still living in California, they decided to start a family together by adopting children from the foster care system in Alameda County, California. In December 2007, the county foster care agency placed their oldest child, a boy, in their home when the child was thirteen months old. About five months later, the agency placed a newborn girl in their home. The children quickly became part of the family and were adopted by Johno and Matt on September 25, 2009. Both Johno and Matt are the legal parents of each child. Johno quit his job as a forklift driver to take care of the children, and Matt continued to work.

54. Approximately four years ago, Matt began working at a large international law firm in San Francisco conducting conflict-of-interest checks. Last year, the firm announced that it was planning to centralize all of its administrative services, including staff who conducted conflicts checks, in a new office located in Nashville, Tennessee. Johno and Matt decided to move their family to the Nashville area so that Matt could continue working for his current employer. As a result, Johno and Matt now live in Nashville with their children and Matt's mother.

55. Matt's employer has instituted policies that seek to offset, to the extent possible under existing

law, some of the harms caused by the State of Tennessee's refusal to recognize Johno and Matt as a married couple. But those policies are not sufficient to shield Johno and Matt from many of the harms caused by Tennessee law. Johno, Matt, and their children are denied the equal dignity and respect that comes from legal recognition of their marriage by the state. Every day Tennessee refuses to respect their marriage is a day that the family must suffer the indignity, stress, and stigma of not knowing whether or when their marriage will be recognized. Unlike opposite-sex couples who have the security of knowing that their marriage will be universally respected by the state and by private actors, Tennessee's constitutional and statutory denial of recognition to their marriage means that whatever recognition Johno and Matt's marriage may receive is only by the forbearance and good graces of Matt's employer or other private actors, and could be withdrawn at any time without recourse under state law.

56. Tennessee's refusal to recognize Johno and Matt's marriage has harmed them and will continue to do so if not remedied by this Court.

Tennessee's refusal to respect plaintiffs' valid out-of-state marriages unconstitutionally deprives them of their liberty and property interest. In their existing marriages and denies them equal protection of the laws

57. The United States Supreme Court has long recognized that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group." *Windsor*, 133 S. Ct. at 2693 (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-35,

93 S. Ct. 2821, 37 L.Ed.2d 782 (1973)). "The avowed purpose and practical effect" of Tennessee's refusal to recognize the marriages of same-sex couples validly celebrated in other jurisdictions "are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Windsor*, 133 S. Ct. at 2693. For this reason, among others, Tennessee's Anti-Recognition Laws are "unconstitutional as a deprivation of the liberty of the person," *id.* at 2695, in violation of the Due Process Clause and as a deprivation of equal protection of the laws under the Fourteenth Amendment.

58. The Anti-Recognition Laws deny recognition to the valid out-of-state marriages of Plaintiffs and other same-sex couples who validly married in their states of residence before deciding to relocate to Tennessee while leaving in place Tennessee's liberal recognition of out-of-state marriages of opposite-sex couples. These laws' "principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency." *Id.* at 2694. In so doing, Tennessee "undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells [same-sex] couples, and all the world, that their otherwise valid marriages are unworthy of . . . recognition" in Tennessee. *Id.*

59. Tennessee's denial of recognition to the valid marriages of same-sex couples "places same-sex couples in an unstable position of being in a second-tier marriage." *Windsor*, 133 S. Ct. at 2694. "The differentiation demeans the couple, . . . [a]nd it humiliates the . . . children now being raised by same-sex couples. The law in question makes it even more

difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.* The Anti-Recognition Laws "instruct[] all [state] officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others." *Id.* at 2696.

60. Tennessee's refusal to recognize the marriages of same-sex couples validly celebrated in their states of residence before moving to Tennessee also deprives these couples and their children of important protections, benefits, and responsibilities under state law. These protections "touch[] many aspects of married and family life, from the mundane to the profound." *Id.* at 2694. Because of Tennessee's denial of recognition to their marriages, same-sex couples who relocate to this state "have their lives burdened, by reason of government decree, in visible and public ways." *Id.*

61. In sum, "the principal purpose and the necessary effect of [the Anti-Recognition Laws] are to demean those persons who are in a lawful same-sex marriage." *Id.* at 2695. The Constitution "withdraws from Government the power to degrade or demean in the way th[ese] law[s do]." *Id.*

> None of the actual or possible justifications for Tennessee's refusal to respect the valid out-of-state marriages of same-sex couples is sufficient to uphold the challenged provisions

62. "[N]o legitimate purpose overcomes the purpose and effect to disparage and to injure" same-sex couples who have lawfully married in other jurisdictions. *Id.* at 2696. To the contrary, each of the justifications offered in support of the Anti-Recognition Laws has

been rejected by the Supreme Court of the United States as a legitimate basis for subjecting same-sex couples to unequal treatment, as these laws do.

63. Tennessee's refusal to recognize the valid out-of-state marriages of same-sex couples cannot be constitutionally justified by appealing to the historical or traditional limitation of marriage to opposite-sex couples. In 1996, the Tennessee General Assembly passed Tennessee Code section 36-3-113 to exclude married same-sex couples from the ordinary rule that a marriage validly celebrated in another jurisdiction will be respected in the State of Tennessee. The first time the bill was discussed on the Senate floor, Senator Holcomb, who sponsored the bill, stated: "I don't know of anyone here that could possibly say that they ever thought of marriage as being other than a relationship or a union contract between a man and a woman," a theme that was repeated throughout the debates on the bill. Indeed, the language of Section 36-3-113 itself reflects this justification by referring to the limitation of marriage to opposite-sex couples as "the historical institution and legal contract" of marriage. This language also appears in the text of the DOMA Amendment, which passed in 2004. Such appeals to history and tradition cannot provide a sufficient justification for the harms the challenged provisions inflict on Plaintiffs and other same-sex couples. The Supreme Court has recognized that tradition is not a legitimate reason to deny equal treatment to same-sex couples and relationships. *Lawrence*, 539 at 577-78 (explaining that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice" and providing the example that "neither history nor tradition could save a law prohibiting miscegenation

from constitutional attack") (quotation and citation omitted).

64. Likewise, the exclusion of married same-sex couples from Tennessee's usual rule of liberally recognizing out-of-state marriages cannot be constitutionally justified by moral objections to same-sex relationships or vague appeals to "social and economic order and the common good." Tenn. Code Ann. § 36-3-113. Such views were also reflected in the floor debates on the challenged statute. Representative Peach remarked that "I think [the bill] is a strong move to support the traditional family, and support the family as intended when God created this world." During the debate, Representative Peach questioned whether there has "ever known of a case where a union of two men or two women have produced anything of importance to this society?" He further questioned whether "the union of two men or two women is against the very nature of our humanity?" Such moral condemnation of same-sex couples and relationships is never a legitimate constitutional justification for legislation, and indeed reflects an improper aim to "degrade or demean" same-sex couples and their children. *See Lawrence*, 539 U.S. at 571 (striking down laws criminalizing same-sex sexual intimacy even though "for centuries there have been powerful voices to condemn homosexual conduct as immoral"); *see also Windsor*, 133 S. Ct. at 2695; *Romer v. Evans*, 517 U.S. 620, 634-35 (1996).

65. Nor can the challenged prohibitions be justified by arguing that the state's refusal to recognize the valid marriages of same-sex couples will promote procreation by opposite-sex couples, or that married opposite-sex couples make better parents than

married same-sex couples. Both purported justifications are without merit because there is no rational connection between denying recognition to legal marriages that already exist, including those in which children are being raised, and furthering the goal of encouraging procreation or marriage by opposite-sex couples, and because there is no rational basis for presuming that same-sex couples are less capable of being good parents than opposite-sex couples and no legitimate governmental interest in penalizing children by denying them protections because of their parents' sexual orientation or sex.

66. The legislative history of section 36-3-113 reflects that some supporters of the bill sought to rely on these purported justifications based on procreation and parenting. Senator Fowler, a supporter of the bill, argued that "[w]hat we are simply saying is, that if you just look simply at nature then we would have to conclude that heterosexual relationships are what are intended because they are in the vast majority. The reason that is probably the case is because without that our species does not continue. So we are interested in making sure we continue." Senator Fowler also claimed that "[t]raditional marriages are the best way to raise children. It is the only way to have children; is a male female relationship and we ought to encourage that." These same justifications were presented to the United States Supreme Court in support of the Defense of Marriage Act, and the Court found none of them sufficient to overcome the constitutional harm of denying government recognition to the otherwise valid marriages of same-sex couples who married under the laws of a state where such marriages are permitted. *See Windsor*, 133 S. Ct. at 2696.

67. In short, in this case as in *Windsor*, "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others," the Anti-Recognition Laws violate the Fourteenth Amendment. *Id.*

COUNT I

(Denial of Due Process—Deprivation of Liberty and Property Interest in Existing Valid Marriages)

68. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

69. Before relocating to Tennessee, each Plaintiff enjoyed all of the protections and responsibilities conferred by marriage under the laws of their state of residence, including the unique social recognition, stability, and privacy conferred by the status of marriage. Each of the Plaintiff couples has a reasonable expectation that they will continue to be recognized as married and to enjoy all of the protections and responsibilities conferred by marriage regardless of the fact that they, like so many other Americans, chose to move to another state after they were legally married.

70. As the Supreme Court of the United States recognized in *Windsor*, same-sex spouses who have entered into legal marriages have a protected liberty interest in their marital status, and the government's refusal to recognize their marital status impermissibly deprives legally married same-sex spouses of that protected liberty interest. 133 S. Ct. at 2695.

71. Same-sex spouses who have entered into legal marriages in other jurisdictions have a reasonable expectation that they will continue to be protected by the rights and protections, and by the privacy and social recognition, that are conferred by marriage when they relocate to another state, and those spouses have a protected property interest in their marital status and in the comprehensive network of legal protections that marriage provides, including the accrual of certain marital benefits over time. The government's refusal to recognize their marital status and to provide them with the protections of marriage impermissibly deprives legally married same-sex spouses of that protected property interest.

72. Defendants' actions infringe Plaintiffs' constitutionally protected interests in liberty and property by penalizing Plaintiffs' constitutionally protected choices in the most intimate and personal areas of their lives, and by stripping them of the ongoing protections and security of being married that they enjoyed before moving to Tennessee.

73. Defendants' enforcement of the Anti-Recognition Laws deprive Plaintiffs of their constitutional rights under color of state law.

74. Defendants' deprivation of Plaintiffs' constitutional rights under color of state law violates 42 U.S.C. § 1983.

75. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause them irreparable harm.

76. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

COUNT II

(Denial of Equal Protection of the Laws—Sexual Orientation Discrimination)

77. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

78. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

79. Defendants' enforcement, under color of state law, of the Anti-Recognition Laws by refusing to respect Plaintiffs' valid out-of-state marriages, even though Tennessee respects the out-of-state marriages of opposite-sex couples, including opposite-sex couples who could not have legally married under Tennessee's own laws, discriminates against Plaintiffs on the basis of their sexual orientation. As a result of such discrimination, Plaintiffs are deprived of the many benefits afforded opposite-sex couples whose out-of-state marriages are recognized in Tennessee. Tennessee's refusal to respect Plaintiffs' marriages, and Defendants' actions to enforce that refusal, denies married same-sex couples equal dignity and respect, treats same-sex couples and their children as second class citizens (and their legal marriages as second-class marriages), and invites private bias and discrimination by instructing all persons with whom same-sex couples interact, including their own children, that their marriages are less worthy than the marriages of others. Tennessee's constitutional and statutory provisions categorically withdrawing recognition from the out-of-state marriages of same-sex

couples reflect disapproval and animus toward same-sex couples.

80. Married same-sex couples such as Plaintiffs are similar to married opposite-sex couples in all respects relevant to Tennessee's recognition of out-of-state marriages. Plaintiffs have made the same enduring commitment to one another as any other married couple, have promised to build their lives together as a family and to care for one another's physical health and emotional and financial well-being, and were afforded all of the rights and responsibilities of civil marriage by the states that granted them their marriages while they lived in those states.

81. Many same-sex couples, including two of the Plaintiff couples in this action, are or will be parents raising children together. Plaintiffs and their children are entitled to the privacy, respect, and equal dignity that legal recognition of their marriages provides for opposite-sex married couples and their children, as well as the tangible protections and responsibilities that state law provides to married couples and their children.

82. The Anti-Recognition Laws and any other Tennessee law that purports to deny recognition to marriages of same-sex couples validly celebrated in another jurisdiction are unconstitutional on their face and as applied to Plaintiffs because they violate the Equal Protection Clause by categorically withholding recognition of such marriages on the basis of sexual orientation.

83. This categorical deprivation is not rationally related to the furtherance of any legitimate govern-

ment interest, let alone narrowly tailored to substantially advance any compelling or important government interest.

84. Tennessee's refusal to respect the valid out-of-state marriages of Plaintiffs based on their sexual orientation is subject to heightened scrutiny under the Equal Protection Clause.

85. Sexual orientation bears no relation to a person's ability to perform in or contribute to society.

86. Gay, lesbian, and bisexual people have endured a long history of discrimination both in Tennessee and nationally.

87. Sexual orientation is a trait that is so deep-seated and fundamental to an individual's identity and sense of self that no person should be required to change it to avoid discrimination, even if such change were possible.

88. Gay, lesbian, and bisexual people are a small and disfavored minority, and ongoing prejudice against them continues seriously to curtail the operation of those political processes that might ordinarily be relied upon to protect minorities. Gay, lesbian, and bisexual people lack express statutory protection against discrimination in employment, public accommodations, and housing at the federal level and in more than half the states, including Tennessee. They are underrepresented in federal, state, and local elected offices; indeed, there are no openly gay elected officials in any state office in Tennessee. Gay, lesbian, and bisexual people have been frequent targets of discriminatory voter initiatives, and same-sex couples have been stripped of the right to marry through 30 state constitutional amendments.

89. Moreover, laws that discriminate based on sexual orientation are grounded in impermissible gender stereotypes and gender-based expectations, and such laws therefore warrant at least the same level of heightened scrutiny that the courts apply to laws that discriminate based on sex.

90. Defendants' deprivation of Plaintiffs' constitutional rights under color of state law violates 42 U.S.C. § 1983.

91. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause them irreparable harm.

92. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

COUNT III

(Denial of Equal Protection of the Laws—Sex Discrimination)

93. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

94. Defendants' enforcement, under color of state law, of the Anti-Recognition Laws by refusing to respect Plaintiffs' valid out-of-state marriages discriminates against Plaintiffs on the basis of their sex. Because each Plaintiff is married to a person of the same sex rather than a person of the opposite sex, Plaintiffs are deprived of the many benefits afforded opposite-sex couples whose out-of-state marriages are recognized in Tennessee.

95. The sex-based classifications created by the Anti-Recognition Laws, and any other Tennessee law

that purports to deny recognition to marriages of same-sex couples validly celebrated in another jurisdiction, violate the Equal Protection Clause both facially and as applied to Plaintiffs. These sex-based classifications are apparent on the face of the Anti-Recognition Laws, both of which limit recognition to marriages comprised of "one (1) man and one (1) woman" and provide that marriages involving spouses of the same sex are "void and unenforceable" in Tennessee. Because of these classifications, each Plaintiff is prevented from having his or her marriage recognized solely because of the Plaintiff's sex. For example, if Sophy were a man rather than a woman married to Valeria, her marriage, validly celebrated in New York, would be fully respected under Tennessee law. Because Sophy is a woman, however, Tennessee categorically denies recognition to her marriage.

96. Tennessee's refusal to respect the valid out-of-state marriages of same-sex couples who legally married in their states of residence before moving to Tennessee also unconstitutionally penalizes Plaintiffs for their nonconformity with sex-based stereotypes.

97. Tennessee's categorical denial of recognition to Plaintiffs' marriages based on Plaintiffs' sex and their nonconformity with sex stereotypes requires application of heightened scrutiny under the Equal Protection Clause.

98. Tennessee's refusal to respect Plaintiffs' valid out-of-state marriages does not sufficiently advance any important or compelling government interest to survive heightened scrutiny.

99. Defendants' deprivation of Plaintiffs' constitutional rights under color of state law violates 42 U.S.C. § 1983.

100. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause them irreparable harm.

101. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

COUNT IV

(Denial of Due Process— Fundamental Right to Marry)

102. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

103. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

104. The right to marry the person of one's choice is a fundamental liberty interest protected by the Due Process Clause. Defendants' refusal, under color of state law, to respect the valid out-of-state marriages of Plaintiffs and other same-sex couples unconstitutionally burdens this liberty interest and constitutes a "deprivation of the liberty of the person," *Windsor*, 133 S. Ct. at 2695, protected by the Fourteenth Amendment. The Anti-Recognition Laws, and any other state law that purports to deny recognition to marriages of same-sex couples validly celebrated in another jurisdiction, are unconstitutional on their face and as applied to Plaintiffs.

105. Defendants' actions infringe Plaintiffs' fundamental right to marry by penalizing Plaintiffs' constitutionally protected choice to marry the person

they love. Because government interference with this fundamental right triggers strict scrutiny, Tennessee's refusal to recognize the valid out-of-state marriages of same-sex couples who legally married in their states of residence before relocating to Tennessee may be upheld only upon a showing that the restriction is narrowly tailored to advance a compelling government interest. Defendants cannot satisfy this requirement; indeed, the challenged statutes are not even rationally related to the furtherance of a legitimate government interest.

106. Defendants' deprivation of Plaintiffs' constitutional rights under color of state law violates 42 U.S.C. § 1983.

107. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause them irreparable harm.

108. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

COUNT V

(Denial of Due Process—Denial of Family Privacy, Autonomy and Association)

109. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

110. The Due Process Clause also protects fundamental liberty interests in choices that lie at the core of personal dignity, privacy, and autonomy, including each person's right to family integrity and intimate association. Defendants' refusal, under color of state law, to respect the valid out-of-state marriages

of Plaintiffs and other same-sex couples who married in their states of residence before relocating to Tennessee unconstitutionally burdens and infringes on Plaintiffs' intimate, personal, and private decisions about how and with whom they have chosen to form a family, and prevents them from enjoying their constitutionally protected interests in liberty, dignity, privacy, and security for themselves and their families. Defendants' actions therefore constitute a "deprivation of the liberty of the person," *Windsor*, 133 S. Ct. at 2695, protected by the Fourteenth Amendment. Thus, the Anti-Recognition Laws, and any other state law that purports to deny recognition to marriages of same-sex couples validly celebrated in another jurisdiction, are unconstitutional on their face and as applied to Plaintiffs.

111. Defendants' actions infringe Plaintiffs' constitutionally protected interests in liberty, autonomy, family privacy, and association by penalizing Plaintiffs' constitutionally protected choices in the most intimate and personal areas of their lives. Because government interference with this fundamental liberty interest triggers strict scrutiny, Tennessee's refusal to recognize the valid out-of-state marriages of same-sex couples may be upheld only upon a showing that the restriction is narrowly tailored to advance a compelling government interest. Defendants cannot satisfy this requirement; indeed, the challenged statutes are not even rationally related to the furtherance of a legitimate government interest.

112. Defendants' deprivation of Plaintiffs' constitutional rights under color of state law violates 42 U.S.C. § 1983.

113. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a

continuing nature and will cause them irreparable harm.

114. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

COUNT VI

(Deprivation of Right to Travel)

115. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

116. The Fourteenth Amendment protects the liberty of individuals to travel throughout the nation, uninhibited by statutes, rules, or regulations that unreasonably burden or restrict their movement. This right guards against interference with citizens' rights "to migrate, resettle, find a new job, and start a new life." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). The right to travel prohibits both laws that affirmatively interfere with or prevent a citizen's travel, and also laws that "penaliz[e] those who choose to" migrate to another state. *Id.* at 631. The right extends not only to temporary visits to other states, but also to becoming a permanent resident of another state. *Id.*

117. Defendants' refusal, under color of state law, to respect the valid out-of-state marriages of Plaintiffs and other same-sex couples unconstitutionally burdens and infringes on Plaintiffs' right to travel throughout the nation and to resettle and make a new home in Tennessee. By conditioning Plaintiffs' move to Tennessee on relinquishment of all rights, benefits, and responsibilities of their marriages lawfully celebrated in other states, the state has imposed a penalty on Plaintiffs' exercise of their constitutionally

protected right to travel. Defendants' actions therefore constitute a "deprivation of the liberty of the person," *Windsor*, 133 S. Ct. at 2695, protected by the Fourteenth Amendment. For this reason, the Anti-Recognition Laws, and any other state law that purports to deny recognition to marriages of same-sex couples validly celebrated in another jurisdiction, are unconstitutional on their face and as applied to Plaintiffs.

118. A law that has the effect of imposing a penalty on the exercise of the right to travel is subject to strict scrutiny and may be upheld only upon a showing that the restriction is narrowly tailored to advance a compelling government interest. Defendants cannot satisfy this requirement; indeed, the challenged statutes are not even rationally related to the furtherance of a legitimate government interest.

119. Defendants' deprivation of Plaintiffs' constitutional rights under color of state law violates 42 U.S.C. § 1983.

120. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause them irreparable harm.

121. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

COUNT VII

(Equal Protection—Discrimination Based On Exercise of Fundamental Rights and Liberties)

122. Plaintiffs repeat and incorporate by reference all of the above allegations of this Complaint as though fully set forth herein.

123. The Equal Protection Clause also protects Plaintiffs against discrimination concerning their exercise of fundamental rights and constitutionally protected liberty interests protected by the Due Process Clause. Defendants' refusal, under color of state law, to respect the valid out-of-state marriages of Plaintiffs and other same-sex couples who legally married in their states of residence before choosing to relocate to Tennessee unconstitutionally discriminates against Plaintiffs with respect to their exercise of their fundamental right to marry, their liberty interests in dignity, autonomy, family privacy and association, and their right to travel. Therefore, the Anti-Recognition Law, and any other Tennessee law that purports to deny recognition to marriages of same-sex couples validly celebrated in another jurisdiction, are unconstitutional on their face and as applied to Plaintiffs.

124. Tennessee's refusal to respect the valid out-of-state marriages of same-sex couples constitutes discrimination with respect to Plaintiffs' exercise of fundamental rights and liberty interests based on their sexual orientation and sex, and is subject to heightened or strict scrutiny.

125. Defendants' refusal to respect Plaintiffs' marriages is not rationally related to the furtherance of any legitimate government interest, let alone narrowly tailored to substantially advance any compelling or important government interest.

126. Defendants' deprivation of Plaintiffs' constitutional rights under color of state law violates 42 U.S.C. § 1983.

127. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause them irreparable harm.

128. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief as requested in this Complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment as follows:

1. Declaring that article XI, section 18 of the Constitution of the State of Tennessee, Tennessee Code Annotated § 36-3-113, and any other state law that purports to deny recognition to the marriages of Plaintiffs and other same-sex couples who validly married under the law of another jurisdiction while residents of that jurisdiction, violate Plaintiffs' rights under the Due Process, Equal Protection, and Privileges or Immunities Clauses of the Fourteenth Amendment of the United States Constitution, and may not be enforced against Plaintiffs or any other same-sex couple who validly married in another jurisdiction.

2. Preliminarily and permanently enjoining enforcement by Defendants; their officers, employees, and agents; all individuals under any Defendant's supervision, direction, or control; and all persons acting in concert or participation with any Defendant, from enforcing article XI, section 18 of the Constitution of the State of Tennessee, Tennessee Code Annotated § 36-3-113, and any other state law that purports to deny recognition to the marriages of Plaintiffs and other same-sex couples who validly married under the law of another jurisdiction while they were residents of that jurisdiction.

3. Requiring Defendants in their official capacities; their officers, employees, and agents; all individuals under any Defendant's supervision, direction, or control; and all persons acting in concert or participation with any Defendant, fully to recognize the marriages of Plaintiffs and all other same-sex couples who validly married under the law of another jurisdiction as valid and enforceable under all Tennessee state laws, regulations, and policies, including without limitation: permitting the same-sex spouses of state employees to access spousal health insurance and all other employee benefits provided to opposite-sex spouses of state employees; permitting married same-sex couples to hold real property in tenancy by the entirety; applying the statutory presumption of legal parentage to children born to married same-sex parents; and permitting same-sex spouses to change their names on driver's licenses and other state-issued identification documents in the same-manner as opposite-sex spouses.

4. Awarding Plaintiffs their costs, expenses, and reasonable attorneys' fees according to 42 U.S.C. § 1988 and any other applicable laws; and

5. Granting such other and further relief as the Court deems just and proper.

Dated this 21st day of October 2013.

Respectfully submitted,
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Attorneys for Plaintiffs

JS 44 (Rev. 09/11)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Valeria Tanco and Sophy Jesty, IJPE DeKoe and Thomas Kostura, Kellie Miller and Vanessa Devillez, and Jobno Espejo and Matthew Mansell,

(b) County of Residence of First Listed Plaintiff Knox
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
William L. Harbison, Sherrard & Roe, PLC
150 3rd Avenue South, Ste. 1100
Nashville, TN 37201 (615) 742-4200

DEFENDANTS William Edward "Bill" Haslam, as Governor of the State of Tennessee, in his official capacity; Bill Gibbons, as Commissioner of the Dept. of Safety and Homeland Security, in his official capacity, Larry Martin, as Commissioner of the Dept. of Finance and Administration, in his official capacity, and Robert Cooper, as Attorney General & Reporter of the State of Tennessee, in his official capacity.
County of Residence of First Listed Defendant Davidson
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*
- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business in This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business in Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 625 Drug Related Seizure of Property 21 USC 881	☐ 422 Appeal 28 USC 158	☐ 375 False Claims Act
☐ 120 Marine	☐ 310 Airplane	☐ 365 Personal Injury - Product Liability	☐ 690 Other	☐ 423 Withdrawal 28 USC 157	☐ 400 State Reapportionment
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability		PROPERTY RIGHTS	☐ 410 Antitrust
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability		☐ 820 Copyrights	☐ 430 Banks and Banking
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability			☐ 830 Patent	☐ 450 Commerce
☐ 151 Medicare Act	☐ 340 Marine			☐ 840 Trademark	☐ 460 Deportation
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	PERSONAL PROPERTY	LABOR	SOCIAL SECURITY	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 370 Other Fraud	☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 480 Consumer Credit
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 371 Truth in Lending	☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 490 Cable/Sat TV
☐ 190 Other Contract	☐ 360 Other Personal Injury	☐ 380 Other Personal Property Damage	☐ 740 Railway Labor Act	☐ 863 DIWC/DIWW (405(g))	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability	☐ 362 Personal Injury - Med. Malpractice	☐ 385 Property Damage Product Liability	☐ 751 Family and Medical Leave Act	☐ 864 SSID Title XVI	☐ 890 Other Statutory Actions
☐ 196 Franchise			☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 891 Agricultural Acts
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 210 Land Condemnation	☐ 440 Other Civil Rights	☐ 510 Motions to Vacate Sentence Habeas Corpus		☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 895 Freedom of Information Act
☐ 220 Foreclosure	☐ 441 Voting	☐ 530 General	IMMIGRATION	☐ 871 IRS—Third Party 26 USC 7609	☐ 896 Arbitration
☐ 230 Rent Lease & Ejectment	☐ 442 Employment	☐ 535 Death Penalty	☐ 462 Naturalization Application		☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
☐ 240 Torts to Land	☐ 443 Housing/ Accommodations	☐ 540 Mandamus & Other	☐ 463 Habeas Corpus - Alien Detainee (Prisoner Petition)		☒ 950 Constitutionality of State Statutes
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 550 Civil Rights	☐ 465 Other Immigration Actions		
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 555 Prison Condition			
	☐ 448 Education	☐ 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN *(Place an "X" in One Box Only)*
☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*: 42 USC 1983
Brief description of cause: Constitutional challenge to Tennessee laws denying recognition to valid marriages celebrated in other states.

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND $
CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*
JUDGE DOCKET NUMBER

DATE
October 21, 2013

SIGNATURE OF ATTORNEY OF RECORD
William L. Harbison

FOR OFFICE USE ONLY
RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Filed 12/6/13]

Case No. 3:13-cv-01159

VALERIA TANCO and SOPHY JESTY, ET AL.,

Plaintiffs,

vs.

WILLIAM EDWARD "BILL" HASLAM,
as Governor of the State of Tennessee, ET AL.,

Defendants.

Trauger/Griffin

DECLARATION OF MARK GOINS, STATE COORDINATOR OF ELECTIONS

I, Mark Goins, pursuant to the provisions of 28 U.S.C. § 1746, do hereby declare as follows:

1. I am over 18 years of age and competent to testify upon personal knowledge regarding the matter set forth herein.

2. I am the Coordinator of Elections for the State of Tennessee. I was appointed by the Tennessee Secretary of State to this position on February 11, 2009.

3. Pursuant to Tenn. Code Ann. §§ 2-8-105 and -106(a), county election commissions seal and mail the original tabulation and certification of election results for questions submitted to the people of

the entire state, such as referendum questions on Tennessee constitutional amendments, to the Secretary of State.

4. As the Coordinator of Elections for the State of Tennessee, within the Tennessee Secretary of State's Office, I am a custodian of such statewide question election results.

5. Attached to this declaration, is a true and correct copy of the Certification of Election Results For the General Election Held November 7, 2006, which includes the 3-pages of election results for Constitutional Amendment Questions - #1, whether Article XI of the Constitution of the State of Tennessee shall be amended by adding specified language regarding marriage.

6. These election results show that statewide 1,419,434 voted for the amendment (#1) and 327,536 voted against the amendment (#1).

I declare under penalty of perjury that the foregoing is true and correct. Executed by me this 5 day of December, 2013 at Nashville Tennessee.

/s/ Mark Goins
Mark Goins
State Coordinator of Elections

EXHIBIT A

CERTIFICATION OF ELECTION RESULTS
FOR THE GENERAL ELECTION HELD
NOVEMBER 7, 2006

We the undersigned, Phil. Bredesen, Governor of the State of Tennessee; Robert E. Cooper, Jr., Attorney General and Reporter, State of Tennessee; and Riley C. Darnell, Secretary of State, State of Tennessee, having received and compared the returns of the general election held on Tuesday, November 7, 2006, for the State of Tennessee, and having ascertained the persons receiving the highest number of votes in each election, do hereby certify that the attached compilation is a true and correct copy of the results of that election.

Witness our hands and the Great Seal of the State of Tennessee, which is directed by the Governor to be affixed hereto by the Secretary of State, this 7th day of December in the year of our Lord, Two Thousand Six.

/s/ Phil Bredesen
Phil Bredesen
GOVERNOR

/s/ Robert E. Cooper
Robert E. Cooper
ATTORNEY GENERAL AND REPORTER

/s/ Riley C. Darnell
Riley C. Darnell
SECRETARY OF STATE

[SEAL]

November 7, 2006
General Election
Constitutional Amendment Questions

Constitutional Amendment # 1

Shall Article XI of the Constitution of the State of Tennessee be amended by adding the following language as a new, appropriately designated section:

SECTION _____ The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

Constitutional Amendment # 2

Shall Article II Section 28, of the Constitution of the State of Tennessee be amended by inserting the following language immediately after the fourth paragraph.

By general law, the legislature may authorize the following program of tax relief:

(a) The legislative body of any county or municipality may provide by resolution or ordinance that:

(1) Any taxpayer who is sixty-five (65) years of age or older and who owns residential property as the taxpayer's principal place of

residence shall pay taxes on such property in an amount not to exceed the maximum amount of tax on such property imposed at the time the ordinance or resolution is adopted;

(2) Any taxpayer who reaches the age of sixty-five (65) after the time the ordinance or resolution is adopted, who owns residential property as the taxpayer's principal place of residence, shall thereafter pay taxes on such property in an amount not to exceed the maximum amount of tax on such property imposed in the tax year in which such taxpayer reaches age sixty-five (65); and

(3) Any taxpayer who is sixty-five (65) years of age or older, who purchases residential property as the taxpayer's principal place of residence after the taxpayer's sixty-fifth birthday, shall pay taxes in an amount not to exceed the maximum amount of tax imposed on such property in the tax year in which such property is purchased.

(b) whenever the full market value of such property is increased as a result of improvements to such property after the time the ordinance or resolution is adopted, then the assessed value of such property shall be adjusted to include such increased value and the taxes shall also be increased proportionally with the value.

(c) Any taxpayer or taxpayers who own residential property as their principal place of residence whose total or combined annual income or wealth exceeds an amount to be determined by

the General Assembly shall not be eligible to receive the tax relief provided in subsection (a) or (b)?

1 Constitutional Amendment #1

2 Constitutional Amendment #2

	1 -Yes	1 - No	2- Yes	2 - No
ANDERSON	16,931	5,689	18,013	3,498
BEDFORD	9,113	1,319	5,195	1,449
BENTON	4,633	087	3,903	008
BLEDSOE	3,484	928	3,077	429
BLOUNT	27,745	6,922	27,224	6,909
BRADLEY	23,022	3,027	21,523	3,841
CAMPBELL	8,110	1,192	7,063	1,477
CANNON	3,803	610	3,247.	889
CARROLL	7,689	878	6,695	1,220
CARTER	14,050	1,929	12,806	2,090
CHEATHAM	9,024	2,110	8,672	1,730
CHESTER	3,777	335	3,338	473
CLAIBORNE	8,189	852	3,387	1,102
CLAY	2,028	323	1,731	348
COCKE	7,975	1,317	7,371	1,307
COFFEE	12,684	2,219	11,947	2,117
CROCKETT	4,023	350	3,543	595
CUMBERLAND	15,445	3,190	15,105	2,607
DAVIDSON	115,461	54,401	125,375	29,403
DECATUR	3,450	288	3,007	388
DEKALB	4,795	074	4,120	805
DICKSON	11,872	2,048	11,186	1,799
DYER	9,351	1,266	8,304	1,713

November 7, 2006
General Election

1 Constitutional Amendment #1

2 Constitutional Amendment #2

	1 -Yes	1 - No	2- Yes	2 - No
FAYETTE	10,305	1,471	9,587	1,538
FENTRESS	4,896	473	3,079	744
FRANKLIN	10,201	2,130	9,537	1,743
GIBSON	13,287	1,702	11,743	2,392
GILES	6,931	1,155	6,215	1,273
GRAINGER	4,715	552	4,226	018
GREENE	15,565	2,229	14,507	2,257
GRUNDY	3,377	424	2,988	585
HAMBLEN	14,180	2,020	12,894	2,021
HAMILTON	83,621	20,719	04,484	15,188
HANCOCK	1,842	185	1,298	250
HARDEMAN	5,960	916	5,118	1,193
HARDIN	5,399	703	5,098	1,127
HAWKINS	12,334	1,575	11,047	2,092
HAYWOOD	4,770	680	3,935	1,034
HENDERSON	7,732	647	7,116	851
HENRY	5,189	1,347	7,005	1,382
HICKMAN	5,814	910	5,109	945
HOUSTON	2,166	358	1,908	350
HUMPHREYS	5,190	778	4,651	872
JACKSON	3,286	501	2,802	527

JEFFERSON	10,767	2,031	10,240	1,880
JOHNSON	4,008	645	3,602	740
KNOX	53,006	33,648	89,058	22,707
LAKE	1,280	208	1,053	293
LAUDERDALE	8,818	565	5,007	1,297
LAWRENCE	10,915	1,329	9,272	1,727
LEWIS	3,349	521	3,157	431
LINCOLN	6,331	1,037	5,486	1,382
LOUDON	12,827	2,871	12,451	2,431
MACON	4,805	546	3,975	786
MADISON	24,889	3,778	21,780	5,080
MARION	7,255	1,115	6,238	1,018
MARSHALL	5,948	1,033	5,398	1,081
MAURY	18,663	3,592	17,887	3,371
MCMINN	11,923	1,011	10,519	1,985
MCNAIRY	5,814	778	5,640	1,395
MEIGS	2,883	416	2,440	407
MONROE	10,639	1,400	9,879	1,411
MONTGOMERY	27,504	7,329	28,237	5,903
MOORE	1,808	246	1,630	238
MORGAN	4,312	551	3,807	822
OBION	8,321	783	6,903	1,231
OVERTON	5,735	638	4,702	822
PERRY	1,965	287	1,700	320
PICKETT	1,044	188	1,525	245

POLK	4,310	573	4,089	526
PUTNAM	10,021	3,242	15,805	2,625
RHEA	7,483	822	6,982	873
ROANE	13,480	3,250	13,039	2,004
ROBERTSON	15,876	2,080	14,048	3,938
RUTHERFORD	48,300	12,302	47,798	9,995
SCOTT	4,469	820	3,777	774
SEQUATCHIE	3,435	803	3,075	575
SEVIER	19,047	3,731	18,307	3,326
SHELBY	204,855	52,048	198,100	45,376
SMITH	5,223	877	4,441	1,123
STEWART	3,605	597	3,397	815
SULLIVAN	38,903	8,656	34,531	6,784
SUMNER	38,374	7,162	37,449	6,216
TIPTON	14,324	1,906	13,524	2,128
TROUSDALE	2,041	398	1,846	406
UNICOI	4,853	651	4,345	745
UNION	3,694	033	3,193	730
VAN BUREN	1,659	229	1,470	272
WARREN	9,654	1,273	8,452	1,355
WASHINGTON	27,300	6,402	28,524	5,399
WAYNE	3,723	327	2,994	534

November 7, 2006
General Election

1 Constitutional Amendment #1

2 Constitutional Amendment #2

	1 - Yes	1 - No	2 - Yes	2 - No
WEAKLEY	4,449	1,042	7,279	1,479
WHITE	6,735	735	0,609	1,006
WILLIAMSON	46,301	12,003	40,039	5,401
WILSON	29,792	6,320	27,023	4,001
STATEWIDE TOTALS	1,419,434	327,536	1,361,082	278,130

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

[Filed: 3/20/14]

Case No. 3:13-cv-01159

VALERIA TANCO and SOPHIE JESTY, ET AL.,

Plaintiffs,

v.

WILLIAM EDWARD "BILL" HASLAM, ET AL.,

Defendants.

Judge Aleta A. Trauger

MEMORANDUM & ORDER

On March 14, 2014, the court issued a preliminary injunction barring the defendants and those under their supervision from enforcing Tenn. Code Ann. § 36-3-113 and Art. XI., § 18 of the Tennessee Constitution (collectively, the "Anti-Recognition Laws") against the six named plaintiffs in this action. (*See* Docket Nos. 67 (Memorandum), 68 (Order), and 69 (Preliminary Injunction).) On March 18, 2014, the defendants filed (1) a Notice of Appeal to the Sixth Circuit (Docket No. 74) and (2) a Motion to Stay the Preliminary Injunction pursuant to Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8(a) (Docket Nos. 72 (Motion) and 73 (Memorandum of Law)), to which the plaintiffs have filed a Response in opposition (Docket No. 77). In their Motion to Stay, the defendants ask the court to stay the Preliminary Injunction pending resolution of the

merits of their appeal or, in the alternative, to stay the Preliminary Injunction for 21 days to allow the defendants to pursue a similar request for relief before the Sixth Circuit.[1]

STANDARD FOR MOTION TO STAY PENDING APPEAL

When considering a stay pending appeal, a court must consider "the traditional factors governing injunctive relief," including "(1) whether the defendant has a strong or substantial likelihood of success on the merits; (2) whether the defendant will suffer irreparable harm if the district court proceedings are not stayed; (3) whether staying the district court proceedings will substantially injure other interested parties; and (4) where the public interest lies." *Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002). Furthermore:

> These factors are to be balanced. The strength of the likelihood of success on the merits that needs to be demonstrated is inversely proportional to the amount of irreparable harm that will be suffered if a stay does not issue. However, in order to justify a stay of the

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[1] Under Fed. R. App. 8(a)(1), "[a] party must ordinarily move first in the district court for . . . (C) an order suspending, modifying, restoring or granting an injunction while an appeal is pending." Under Fed. R. Civ. P. 62(c), "[w]hile an appeal is pending from an interlocutory order . . . that grants . . . an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." In substance, absent a showing that moving first in the district court would be impracticable (*see* Fed. R. App. P. 8(a)(2)(A)(i)), defendants may not seek a stay from the appellate court unless and until they have moved for and been denied such relief by the district court.

> district court's ruling, the defendant must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted.

Id.

In evaluating the harm that will occur depending upon whether or not the stay is granted, we generally look to three factors: (1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided. *Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). The Sixth Circuit has provided additional guidance for evaluating the degree of injury to a defendant:

In evaluating the degree of injury, it is important to remember that:

> [t]he key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm. *Sampson v. Murray*, 415 U.S. 61, 90 [] (1974)).

In addition, the harm alleged must be both certain and immediate, rather than speculative or theoretical. In order to substantiate a claim that irreparable injury is likely to occur, a movant must provide some evidence that the harm has occurred in the past and is likely to occur again.

> Of course, in order for a reviewing court to adequately consider these four factors, the movant must address each factor, regardless of its relative strength, providing specific facts and affidavits supporting assertions that these factors exist.

Griepentrog, 945 F.2d at 154 (certain citations omitted, emphasis in original).[2]

ANALYSIS

I. Likelihood of Success on the Merits

The defendants argue that there is a "serious question" concerning the merits of the court's finding that the plaintiffs are likely to succeed on the merits, contending that the court erroneously failed to place the burden on the plaintiffs to show that the Anti-Recognition Laws lack a rational basis. However, as the court previously explained, (1) the post-*Windsor* courts have uniformly found that bans on the consummation and/or recognition of same-sex marriages are unconstitutional under rational basis review, (2) the court found the reasoning in those cases, particularly *Bourke v. Beshear*, to be persuasive,[3] and

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[2] *See also Grass Lake All Season Resort v. United States*, 2005 WL 3447869, at *3 (E.D. Mich. Dec. 15, 2005) (finding no irreparable injury to plaintiff from enforcement of district court judgment, where "there is no evidence provided" to support the plaintiff's contention that house would sell for an amount below the full and fair market value of the property); *S&M Brands, Inc. v. Summers*, 2006 WL 1804606, at *3 (M.D. Tenn. June 28, 2006) (finding no irreparable harm, where, among other deficiencies, defendant failed to provide evidentiary support for its allegations of irreparable harm).

[3] Following the intervention of additional plaintiffs after the court's judgment concerning Kentucky's anti-recognition laws, the case previously captioned as "*Bourke, et al. v. Beshear, et al.*"

(3) the court found no basis to conclude that Tennessee's Anti-Recognition Laws would merit different treatment under the United States Constitution than the laws at issue in these other cases.

Moreover, in support of their Motion for Preliminary Injunction, the plaintiffs specifically argued that the following justifications did not constitute a "rational basis" for the Anti-Recognition Laws: "history and tradition," moral disapproval of same-sex marriage, the state's interest in fostering procreative activity, and the belief that married opposite-sex couples make better parents than same-sex couples. (*See* Docket No. 30 at p. 23.) None of these asserted grounds for an anti-recognition law or same-sex marriage ban has survived constitutional scrutiny in any federal post-*Windsor* decision. In its opinion granting the Preliminary Injunction, the court merely pointed out that the defendants, in referencing only the state's interest in procreation (which the plaintiffs specifically argued was not a rational basis for the Anti-Recognition Laws), had provided no new "rational basis" for discriminating against same-sex marriage that had not already been thoroughly and consistently discredited.

Of course, post-*Windsor*, no circuit court (let alone the Supreme Court) has yet issued an opinion addressing state laws that ban same-sex marriage or refuse to recognize legal same-sex marriages consummated in other states. Nevertheless, given the unanimity of opinion as to this point in district courts across the country, the court finds no "serious ques-

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was modified to "*Love, et al. v. Beshear, et al.*" (*See* docket for *Love et al. v. Beshear, et al.*, 3:13-CV-750-H (W.D. Ky.), Docket No. 57.) For purposes of simplicity, the court will hereinafter refer to that case as "*Beshear*."

tion" as to whether this court conducted an appropriate constitutional analysis in reaching essentially the same conclusion.

B. Irreparable Harm

As to the second factor in the court's Rule 62 analysis, the defendants argue that the plaintiffs will not suffer irreparable harm or that, to the extent that they might suffer such harm, the harm is self-inflicted because of the plaintiffs' failure to take other measures to secure the rights at issue. The defendants also argue that the State of Tennessee suffers a form of irreparable harm from being forced not to effectuate a statute enacted by representatives of Tennessee's citizens. The defendants have not asserted any other form of alleged irreparable harm.

The appropriate focus of the court's inquiry is on whether the defendants will suffer irreparable harm from enforcement of the Preliminary Injunction. The court's injunction merely precludes Tennessee (at least temporarily) from enforcing its Anti-Recognition Laws against just *three couples* in Tennessee. Of course, if this court's conclusion that the plaintiffs will likely succeed in their challenge to the Anti-Recognition Laws turns out to be wrong, the State may have suffered some small affront to its sovereignty by being forced to recognize three particular same-sex marriages for a short period of time. That harm, even if arguably "irreparable," would not be substantial, and that harm is unlikely to occur in the first place, because the plaintiffs are likely to succeed. By contrast, as explained in the court's previous opinion, the harms to the plaintiffs from continued enforcement of the Anti-Recognition Laws would be substantial and irreparable. The court finds no reason to revisit that determination.

The defendants point out that, in other cases involving same-sex marriage, courts have stayed the issuance of preliminary or permanent injunctions having statewide effect.[4] However, the defendants are comparing apples and oranges. Those cases all involved bans having *statewide effect*, which inherently created the possibility that implementation of the injunctions would motivate numerous third parties to seek and receive marriage licenses and/or to seek recognition of their out-of-state marriages. Indeed, in the first of these cases, *Kitchen v. Herbert*, the district court declared that Utah's same-sex marriage law was unconstitutional, enjoined the state from enforcing the ban immediately, and refused to grant a stay of the court's injunction.[5] Apparently, the County Clerk in Salt Lake City began issuing marriage licenses that afternoon.[6] The Tenth Circuit

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[4] *See Herbert v. Kitchen*, No. 13A687, 571 U.S. – , 2014 WL 30367 (Jan. 6, 2014) (staying enforcement of district court's permanent injunction against Utah's same-sex marriage ban in *Kitchen v. Herbert*, No. 2:13-cv-217 (D. Utah)); *De Leon v. Perry*, No. SA-13-CA-00982 OLG, – F. Supp. 2d – , 2014 WL 715741, at *27-28 (W.D. Tex. Feb. 26, 2014) (staying preliminary injunction against enforcement of Texas same-sex marriage ban and anti-recognition laws); *Bostic v. Rainey*, Civil No. 2:13-cv-395, – F. Supp. 2d –, 2014 WL 561978, at *23 (E.D. Va. Feb. 13, 2014) (staying injunction against Virginia same-sex marriage ban and anti-recognition laws); *Bishop v. U.S. ex rel. Holder*, No. 04-cv-848-TCK-TLW, – F. Supp. 2d –, 2014 WL 116013, at *33 (N.D. Okla. Jan. 14, 2014) (staying injunction against enforcement of Oklahoma same-sex marriage ban); *see also Beshear* Docket No. 71 (staying implementation of court order striking down Kentucky anti-recognition laws).

[5] *See Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Kitchen v. Herbert*, 2013 WL 6834634 (D. Utah Dec. 23, 2013).

[6] *See* Tenth Circuit docket in *Kitchen v. Herbert*, No. 13-4178 (10th Cir.), Emergency Motion for Temporary Stay, filed Dec. 23, 2013, at p. 5 ("As widely reported by the press, after the district

similarly refused to grant a stay of the district court's order, at which point the defendants petitioned the Supreme Court for a stay of the district court's order. According to media reports, over a thousand same-sex marriage licenses were issued in Utah between the date of the district court's order and the Supreme Court's summary ruling, on January 7, 2014, that the district court's order would be stayed pending appeal.[7]

Subsequently, in *Bostic*, *De Leon*, *Bishop*, and *Beshear*, each court issued an injunction that, like the district court's order in *Kitchen*, would have had statewide effect. In light of the Supreme Court's stay in *Kitchen*, which essentially halted the "rush to marry" by (apparently) thousands of same-sex couples in Utah, the courts in *Bostic*, *De Leon*, *Bishop*, and *Beshear* stayed orders in their cases as well.[8]

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court issued its decision the Salt Lake County Clerk immediately began issuing marriage licenses to same-sex couples and same-sex couples were married Friday afternoon.")

[7] *See* www.nytimes.com/2014/01/09/us/utah-governors-office-says-state-wont-recognize same-sex-marriages.html?_r=0 (Jan 8, 2014) (stating that "about 1,300 same-sex couples" obtained marriage licenses before the Supreme Court's stay); www.usatoday.com/story/news/nation/2014/01/08/utah-same-sex-marriages-not-recognized/4372657/ (Jan. 8, 2014) (stating that Utah would refuse to recognize the "1000-plus same-sex marriages performed in the state since Dec. 20")

[8] For example, as stated in a recent Memorandum and Order in *Beshear*, which struck down Kentucky's anti-recognition laws as unconstitutional, the government argued that enforcement of the court's judgment could result in "chaos," including "the potential granting and then taking away of same-sex marriage recognition to couples," as well as the potential impacts on "businesses and services where marital status is relevant, including health insurance companies, creditors, [and] estate

Here, unlike in *Kitchen*, *Bostic*, *De Leon*, *Bishop*, and *Beshear*, the court's order does not open the floodgates for same-sex couples to marry in Tennessee, nor does it require Tennessee to recognize all legal same-sex marriages performed outside of Tennessee. Instead, the Preliminary Injunction applies only to the three same-sex couples at issue in this case. There is no immediate risk of administrative or legal chaos from implementation of the court's narrow injunction; nor, for that matter, does the government even contend that such risk inheres in the implementation of the court's narrow injunction.

C. Injury to Other Interested Parties

The defendants have not identified any potential injury to "other interested parties," let alone "substantial injury," that would result from continued enforcement of the Preliminary Injunction. *See Baker*, 310 F.3d at 928. By contrast, as this court previously found, the injury to the plaintiffs from continued enforcement of the Anti-Recognition Laws against them would be substantial and irreparable for multiple reasons. Furthermore, although it is conceivable that Dr. Tanco and Dr. Jesty possess or could secure certain rights relative to the child they are expecting tomorrow, they are entitled to the full panoply of rights associated with marriage and the security and peace of mind that those rights will not be abrogated or denied (at least for the time being) relative to their family or their expected child. Moreover, they should not be required to jump through hoops to obtain some limited measure of security. Mr. Espejo and Mr. Mansell would suffer similar injuries relative to their

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planners." Judge Heyburn stated that these considerations presented a "legitimate concern." (*See Beshear*, Docket No. 71.)

children. And all of the plaintiffs will suffer the various other forms of irreparable harm described in the court's previous opinion.

D. The Public Interest

The defendants have argued that preservation of the *status quo* best serves the public interest. This argument, in and of itself, is insufficient. As the plaintiffs point out, any court that enjoins enforcement of an unconstitutional state law necessarily disturbs the *status quo*. Indeed, where a district court had found a Michigan law unconstitutional and enjoined its enforcement, the Sixth Circuit denied a motion by the defendants for a stay pending appeal. *See U.S. Student Assoc. Found. v. Land*, 546 F.3d 373 (6th Cir. 2008); *see also United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998) (criticizing reliance on the "*status quo*" and upholding injunction requiring defendant to accept plaintiff's advertisement, where plaintiff was likely to prevail on First Amendment claim premised on defendant's previous refusal to accept the ad). Of course, disturbing the *status quo* relative to an entire state could implicate sufficiently serious public interest concerns, such as the risk that Judge Heyburn perceived in *Beshear* from implementing an injunction with "dramatic effects" that could sow "undue confusion" and create "confusing changes" regarding the rights of many people. (*Beshear* Docket No. 71.) However, for the reasons previously described, those concerns are not present here. Moreover, as the court explained in its previous opinion, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

E. Balancing of the Factors

The court finds that all four factors weigh against a stay and in favor of continuing enforcement of the Preliminary Injunction. Even if the court were to accept that there is arguably a "serious question" about the merits of its constitutional analysis, the defendants have not even approached their burden to show "irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted." *Baker*, 310 F.3d at 928.

Therefore, for the reasons stated herein, the Motion to Stay is hereby DENIED.

It is so ORDERED.

Enter this 20th day of March 2014.

/s/ Aleta A. Trauger
Aleta A. Trauger
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
(LOUISVILLE)

Civil Docket for Case #: 3:13-cv-00750-JGH

LOVE ET AL.,

v.

BESHEAR,

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
7/26/2013	1	COMPLAINT against Steve Breshear, Jack Conway, Bobbie Hosclaw Filing fee $400, receipt number 644–1659594., filed by I.D.(minor child by and through his parents and next freinds, Gregory Bourke and Michael Deleon), Gregory Bourke, Michael Deleon. (Attachments: # 1 Summons, # 2 Cover Sheet, # 3 Exhibit Marriage certificate) (JSS) ((Main Document 1 replaced on 8/19/2013) (DAK). (Entered: 07/26/2013)
8/16/2013	5	AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF [AMENDED DOCUMENT] by Gregory Bourke. Amendment to 1 Complaint, by Gregory Bourke. (Fauver, Shannon) Modified on 8/16/2013–edited title; was filed as an

DATE	NO.	PROCEEDINGS
		Amended Document (DAK). (Entered: 08/16/2013)
9/25/2013	19	ANSWER to Amended Complaint, by Steve Breshear, Jack Conway. (Barkley, Clay) (Entered: 09/25/2013)
10/28/2013	25	NOTICE of Appearance by Laura E. Landenwich on behalf of Gregory Bourke, Michael Deleon, I.D., I.D. (Landenwich, Laura) (Entered: 10/28/2013)
10/28/2013	26	MOTION to Modify Case Caption by Plaintiffs Gregory Bourke, Michael Deleon,I.D., I.D. Responses due by 11/21/2013 (Attachments: # 1 Proposed Order) (Landenwich, Laura) (Entered: 10/28/2013)
10/31/2013	27	ORDER signed by Judge John G. Heyburn, II on 10/31/2013 granting 26 Motion to Modify Case Caption. cc: Counsel (TJD) (Entered: 10/31/2013)
11/1/2013	29	MOTION for Leave to File Second Amended Complaint by Plaintiff Gregory Bourke Responses due by 11/25/2013 (Attachments: # 1 Exhibit attachment 1, # 2 Proposed Order) (Landenwich, Laura) (Entered: 11/01/2013)

DATE	NO.	PROCEEDINGS
11/15/2013	30	ORDER granting 29 Motion for Leave to file Second Amended Complaint. Signed by Judge John G. Heyburn, II on 11/14/13. cc:counsel (JBM) (Entered: 11/15/2013)
11/15/2013	31	SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF against Steve Breshear, Jack Conway, filed by I.D.(minor child by and through his parents and next freinds, Gregory Bourke and Michael Deleon), Michael Deleon, Gregory Bourke, Luther Barlowe, M.J.–C., Randell Johnson, Jimmy Meade, Paul Campion, Tamera Boyd, Kimberly Franklin, T.J.–C.. (JBM) (Entered: 11/15/2013)
11/25/2013	35	MEMORANDUM AND ORDER by Judge John G. Heyburn, IIon 11/23/2013. IT IS HEREBY ORDERED that motions supporting injunctive relief shall be filed on or before 12/16/2013; responses shall be filed on or before 1/13/2014; and replies on or before 01/23/2014. cc: Counsel (TJD) Modified on 11/25/2013–changed response date from 11/13/2014 to 1/13/2014. (DAK). (Entered:11/25/2013)
11/26/2013	36	NOTICE of Appearance by Leonard J. Dunman on behalf of Gregory Bourke (Landenwich, Laura) Modified on 11/26/2013–corrected attorney (MLG). (Entered:11/26/2013)

DATE	NO.	PROCEEDINGS
12/02/2013	37	ANSWER to 31 Amended Complaint, by Steve Breshear, Jack Conway. (Barkley, Clay) (Entered: 12/02/2013)
12/16/2013	38	MOTION for Summary Judgment by Plaintiffs Luther Barlowe, Gregory Bourke, Tamera Boyd, Paul Campion, Michael Deleon, Kimberly Franklin, Randell Johnson, Jimmy Meade Responses due by 1/9/2014 (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1. Obergefell Opinion, # 3 Exhibit 2. Bourke Affidavit, # 4 Exhibit 3. Franklin Affidavit, # 5 Exhibit 4. Johnson Affidavit, # 6 Exhibit 5. Meade Affidavit, # 7 Exhibit 6. Senate Chambers, # 8 Exhibit 7. Amicus Brief, # 9 Exhibit 8. Bassett Opinion, # 10 Proposed Order Proposed Order) (Landenwich, Laura) (Entered: 12/16/2013)
1/13/2014	39	RESPONSE to Motion re 38 MOTION for Summary Judgment filed by Steve Breshear, Jack Conway. Replies due by 1/30/2014. (Attachments: # 1 Proposed Order Proposed Order) (Judy, Brian) (Entered: 01/13/2014)
1/14/2014	40	REPLY to Response to Motion re 38 MOTION for Summary Judgment filed by Luther Barlowe, Gregory Bourke, Tamera Boyd, Paul Campion, Michael Deleon, Kimberly Franklin, Randell Johnson, Jimmy Meade. (Attachments:

DATE	NO.	PROCEEDINGS
		# 1 Exhibit 1. Kitchen v. Herbert, # 2 Exhibit 2. Obergefell) (Landenwich, Laura) (Entered: 01/14/2014)
1/17/2014	43	BRIEF OF AMICUS CURIAE by The Family Trust Foundation of Kentucky, Inc re 39 Response to Motion filed by Jack Conway, Steve Breshear. (TJD) (Entered: 01/17/2014)
1/23/2014	45	ORDER by Judge John G. Heyburn, II on 1/23/2014; Plaintiffs shall have to 2/3/2014 in which to respond to the amicus brief, should they so choose.cc:counsel (TLB) (Entered: 01/23/2014)
2/3/2014	46	RESPONSE to re 43 Brief of Amicus filed by Luther Barlowe, Gregory Bourke, Tamera Boyd, Paul Campion, Michael Deleon, Kimberly Franklin, I.D.(minor child by and through his parents and next freinds, Gregory Bourke and Michael Deleon), Randell Johnson, M.J.–C., Jimmy Meade, T.J.–C.(Minor Child through their parents and next friends, Randell Johnson and Paul Campion). (Attachments: # 1 Exhibit Hollingsworth ASA Brief) (Canon, Daniel) (Entered: 02/03/2014)
2/12/2014	47	MEMORANDUM OPINION by Judge John G. Heyburn, II on 2/11/2014; re 38 MOTION for Summary Judgment filed by Paul Campion, Jimmy Meade,

DATE	NO.	PROCEEDINGS
		Gregory Bourke, Luther Barlowe, Tamera Boyd, Michael Deleon, Kimberly Franklin, Randell Johnson. The Court will enter an order consistent with this Memorandum Opinion.cc:counsel (DAK) (Entered: 02/12/2014)
2/12/2014	48	ORDER by Judge John G. Heyburn, II on 2/11/2014; re 38 MOTION for Summary Judgment filed by Paul Campion, Jimmy Meade, Gregory Bourke, Luther Barlowe, Tamera Boyd, Michael Deleon, Kimberly Franklin, Randell Johnson, 47 Memorandum & Opinion – To the extent K.R.S. 402.005,.020,.040, and.045 and Section 233A of the Kentucky Constitution deny validly married same–sex couples equal recognition and benefits under Kentucky and federal law, they violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Court will set a hearing in the near future to discuss the appropriate form of relief and the timing of its effect. This is not a final order.cc: Counselcc:counsel (DAK) (Entered: 02/12/2014)
2/14/2014	49	MOTION to Intervene by Intervenor Parties Timothy Love, Lawrence M Ysunza, Maurice Blanchard, Dominique James Responses due by 3/10/2014 (Attachments: # 1 Exhibit

DATE	NO.	PROCEEDINGS
		Intervening Complaint, # 2 Proposed Order) (Canon, Daniel) (Entered: 02/14/2014)
2/14/2014	50	Emergency MOTION for Preliminary Injunction, MOTION for Permanent Injunction by Intervenor Parties Maurice Blanchard, Dominique James, Timothy Love, Lawrence M Ysunza Responses due by 3/10/2014 (Attachments: # 1 Proposed Order) (Canon, Daniel) (Entered: 02/14/2014)
2/27/2014	52	MOTION to Stay re 48 Order,, 47 Memorandum & Opinion, by Defendants Steve Breshear, Jack Conway Responses due by 3/24/2014 (Attachments: # 1 Proposed Order) (Barkley, Clay) (Entered: 02/27/2014)
2/27/2014	53	ORDER by Judge John G. Heyburn, II on 2/27/2014; status/motion hearing held 2/26/2014; 49 Motion to Intervene SUSTAINED; intervening complaint will be filed in the record as of this date; the court establishes the following filing and briefing schedule: Answer to Intervening Complaint due 3/19/2014; Motion and Memorandum for Relief by Plaintiffs due 4/18/2014; response to any motions by Plaintiff or other Amicus Parties due 5/19/2014; reply to any motions by Plaintiff due 5/28/2014. cc:counsel (TLB) (Entered: 02/27/2014)

DATE	NO.	PROCEEDINGS
2/27/2014	54	INTERVENING COMPLAINT AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF, filed by Maurice Blanchard, Dominique James, Timothy Love, Lawrence M Ysunza. (TLB) (Entered: 02/27/2014)
2/27/2014	55	ORDER by Judge John G. Heyburn, II on 2/26/2014; the parties and the Court having discussed 47 Memorandum Opinion and 48 Order; no party having objection to the entry of a final order consistent with it; that to the extend K.R.S. 402.055,.020,.040,and.045 and Section 233A of the Kentucky Constitution act to deny validly married same–sex couples equal recognition and benefits under Kentucky and federal law, those laws violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and they are void and unenforceable; this is a final and appealable order.cc:counsel (TLB) (Entered: 02/27/2014)
2/28/2014	57	ORDER by Judge John G. Heyburn, II on 02/27/2014. IT IS HEREBY ORDERED that the Clerk shall modify the style of the case to Love, et al. vs. Beshear, et al. cc: Counsel (TJD) (Entered: 02/28/2014)
2/28/2014	58	ORDER Signed by Judge John G. Heyburn, II on 2/28/2014 granting 52 Motion to Stay. The Court concludes

DATE	NO.	PROCEEDINGS
		that a limited stay allows the state proper time to administratively prepare for compliance with the Order. Being otherwise sufficiently advised, IT IS HEREBY ORDERED that enforcement of the Courts final order entered February 27, 2014, is STAYED until March 20, 2014.cc:counsel (ARM) (Entered: 02/28/2014)
2/28/2014	59	ORDER Signed by Judge John G. Heyburn, II on 2/28/2014. denying 50 Motion for Preliminary Injunction; denying 50 Motion for Permanent Injunction. cc:counsel (ARM) (Entered: 02/28/2014)
3/14/2014	61	NOTICE of Appearance by Leigh G. Latherow on behalf of Steve Breshear (Latherow, Leigh) (Entered: 03/14/2014)
3/14/2014	63	MOTION to Stay re 55 Order, Add and Terminate Parties,,,, by Intervenor Defendant Steve Breshear Responses due by 4/7/2014 (Attachments: # 1 Memorandum in Support, # 2 Exhibit unpublished cases cited, # 3 Proposed Order) (Latherow, Leigh) (Entered: 03/14/2014)
3/17/2014	64	Objection to 63 MOTION to Stay re 55 Order, Add and Terminate Parties,,,, filed by Luther Barlowe, Gregory Bourke, Tamera Boyd, Paul Campion, Michael Deleon, Kimberly Franklin, Randell Johnson, Jimmy Meade.

DATE	NO.	PROCEEDINGS
		(Attachments: # 1 Affidavit Cristal Fox) (Landenwich, Laura) (Additional attachment(s) added on 3/19/2014: # 2 Proposed Order) (TG). (Entered: 03/17/2014)
3/18/2014	68	NOTICE OF APPEAL as to 48 Order,, 55 Order, Add and Terminate Parties,,,, 47 Memorandum & Opinion, by Steve Breshear. Filing fee $505, receipt number 0644–1788494. (Latherow, Leigh) (Entered: 03/18/2014)
3/19/2014	69	ANSWER to 54 Intervenor Complaint by Steve Breshear. (Latherow, Leigh) (Entered: 03/19/2014)
3/19/2014	71	MEMORANDUM OPINION AND ORDER by Judge John G. Heyburn, II on 3/19/2014 re 63 Motion to Stay; stay of this Court's February 27, 2014 final order is extended until further order of the Sixth Circuit. cc:counsel (TLB) (Entered: 03/19/2014)
3/20/2014	72	MOTION to Dismiss by Intervenor Defendant Jack Conway Responses due by 4/14/2014 (Attachments: # 1 Proposed Order Proposed Order) (Judy, Brian) (Entered: 03/20/2014)
3/24/2014	73	ORDER signed by Judge John G. Heyburn, II on 03/21/2014 granting 72 Motion to Dismiss Defendant Jack Conway, in his official capacity as Attorney General of Kentucky, from

DATE	NO.	PROCEEDINGS
		this action. cc: Counsel (TJD) (Entered: 03/24/2014)
4/18/2014	77	MOTION for Summary Judgment by Intervenor Plaintiffs Maurice Blanchard, Dominique James, Timothy Love, Lawrence M Ysunza Responses due by 5/19/2014 —per DN# 53 Order— (Attachments: # 1 Memorandum in Support, # 2 Affidavit Love/Ysunza Affidavit, # 3 Affidavit Blanchard Affidavit, # 4 Proposed Order) (Canon, Daniel) Modified on 4/23/2014 to correct response ddl. (ARM). (Entered: 04/18/2014)
5/19/2014	87	RESPONSE to Motion re 77 MOTION for Summary Judgment filed by Steve Breshear. Replies due by 5/28/2014—PER DN# 53 Order–. (Attachments: # 1 Exhibit 1 – NPR Article, # 2 Exhibit 2 – New York Times, # 3 Exhibit 3 – SMH Article, # 4 Exhibit 4 – Washington Post, # 5 Proposed Order) (Latherow, Leigh) Modified on 5/21/2014 (ARM). (Entered: 05/19/2014)
5/28/2014	89	REPLY re 77 MOTION for Summary Judgment filed by Maurice Blanchard, Dominique James, Timothy Love, Lawrence M Ysunza. (Attachments: # 1 Exhibit 1: Birth Rates) (Landenwich, Laura) (Entered: 05/28/2014)

DATE	NO.	PROCEEDINGS
7/1/2014	91	MEMORANDUM OPINION AND ORDER by Senior Judge John G. Heyburn, II on 7/1/2014; re 77 MOTION for Summary Judgment filed by Timothy Love, Lawrence M Ysunza, Maurice Blanchard, Dominique James – IT IS HEREBY ORDERED THAT to the extent Ky. Rev. Stat. §§ 402.005 and.020(1)(d) and Section 233A of the Kentucky Constitution deny same–sex couples the right to marry in Kentucky, they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and they are void and unenforceable. IT IS FURTHER ORDERED that for all the reasons set forth in this Courts Memorandum Opinion and Orders in this case dated February 28, 2014 and March 19, 2014, the order here is STAYED until further order of the Sixth Circuit.This is a final and appealable order.cc:counsel (DAK) (Entered: 07/01/2014)
7/8/2014	92	NOTICE OF APPEAL as to 91 Memorandum & Opinion,,, by Steve Breshear. Filing fee $ 505, receipt number 0644–1846213. (Latherow, Leigh) (Entered: 07/08/2014)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals Docket #: 14-5291

GREGORY BOURKE ET AL.,

v.

STEVE BESHEAR ET AL.,

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
3/19/2014	1	Civil Case Docketed. Notice filed by Appellant Steve Breshear. Transcript needed: n. (CB)
3/19/2014	4	Copy of District Court Order filed The stay of the district court's order of 2/27/14 is extended until further order of the Sixth Circuit.. (CB)
3/21/2014	6	APPEARANCE filed for Appellees Luther Barlowe, Gregory Bourke, Tamera Boyd, Paul Campion, Michael Deleon, Kimberly Franklin, I.D., Randell Johnson, M.J.-C., Jimmy Meade and T.J.-C by Daniel J. Canon. Certificate of Service: 03/21/2014. (DJC)
3/25/2014	7	APPEARANCE filed for Appellees Luther Barlowe, Gregory Bourke, Tamera Boyd, Paul Campion, Michael

DATE	NO.	PROCEEDINGS
		Deleon, Kimberly Franklin, I.D., Randell Johnson, M.J.-C., Jimmy Meade and T.J.-C by Dawn Elliott. Certificate of Service: 03/25/2014. (DRE)
3/25/2014	8	BRIEFING LETTER SENT setting briefing schedule: appellant brief due 05/07/2014;. appellee brief due 06/09/2014; (CB)
3/26/2014	9	APPEARANCE filed for Appellees Luther Barlowe, Gregory Bourke, Tamera Boyd, Paul Campion, Michael Deleon, Kimberly Franklin, I.D., Randell Johnson, M.J.-C., Jimmy Meade and T.J.-C by Leonard J. Dunman. Certificate of Service: 03/26/2014. (LJD)
3/26/2014	11	APPEARANCE filed for Appellees Luther Barlowe, Gregory Bourke, Tamera Boyd, Paul Campion, Michael Deleon, Kimberly Franklin, I.D., Randell Johnson, M.J.-C., Jimmy Meade and T.J.-C by Laura E. Landenwich. Certificate of Service: 03/26/2014. (LEL)
3/28/2014	13	APPEARANCE filed for Appellees Luther Barlowe, Gregory Bourke, Tamera Boyd, Paul Campion, Michael Deleon, Kimberly Franklin, I.D., Randell Johnson, M.J.-C., Jimmy Meade and T.J.-C by Shannon Fauver.

DATE	NO.	PROCEEDINGS
		Certificate of Service: 03/28/2014. (SRF)
3/28/2014	14	APPEARANCE filed for Appellant Steve Beshear by Leigh Gross Latherow. Certificate of Service: 03/28/2014. (LGL)
3/31/2014	17	CIVIL APPEAL STATEMENT OF PARTIES AND ISSUES filed by Attorney Ms. Leigh Gross Latherow for Appellant Steve Beshear. Certificate of Service:03/31/2014. (LGL)
4/1/2014	18	APPEARANCE filed for Appellant Steve Beshear by Gregory L. Monge. Certificate of Service: 04/01/2014. (GLM)
4/1/2014	19	APPEARANCE filed for Appellant Steve Beshear by William H. Jones, Jr.. Certificate of Service: 04/01/2014. (WHJ)
5/7/2014	21	APPELLANT BRIEF filed by Ms. Leigh Gross Latherow for Steve Beshear. Certificate of Service: 05/07/2014. Argument Request: requested. (LGL)
6/9/2014	38	APPELLEE BRIEF filed by Mr. Leonard Joe Dunman for Gregory Bourke, Michael Deleon, I.D., Luther Barlowe, M.J.-C., Randell Johnson, Jimmy Meade, Paul Campion, Tamera Boyd, Kimberly Franklin and T.J.-C. Certificate of Service:06/09/2014. Argument Request: requested. (LJD)

DATE	NO.	PROCEEDINGS
6/16/2014	99	Oral argument date set for 1:00 p.m. Wednesday, August 6, 2014. Notice of argument sent to counsel on 06/16/2014. (MCP)
6/26/2014	135	REPLY BRIEF filed by Attorney Ms. Leigh Gross Latherow for Appellant Steve Beshear. Certificate of Service: 06/26/2014. (LGL)
6/27/2014	136	Oral argument acknowledgement filed by Attorney Ms. Laura E. Landenwich for Appellees Gregory Bourke, Michael Deleon, I.D., Luther Barlowe, M.J.-C., Randell Johnson, Jimmy Meade, Paul Campion, Tamera Boyd, Kimberly Franklin and T.J.-C. Certificate of Service: 06/27/2014. (LEL)
6/30/2014	137	Oral argument acknowledgement filed by Attorney Ms. Leigh Gross Latherow for Appellant Steve Beshear. Certificate of Service: 06/30/2014. (LGL)
7/14/2014	141	ORDER filed regarding protocol for oral arguments scheduled for August 6, 2014 in these cases . Entered by order of the court. [14-1341, 14-3057, 14-3464, 14-5291, 14-5297] (CB)
7/16/2014	142	ORDER filed granting joint motion to consolidate for submission only [5127018-2], to consolidate for submission the following cases: 14-5291/5818. [14-5291, 14-5818] (CB)

DATE	NO.	PROCEEDINGS
7/16/2014	143	14-5818 has been consolidated with 14-5291. ORAL ARGUMENT DATE set in 14-5818 at 1:00 p.m. Wednesday, August 6, 2014. Notice of argument sent to counsel on 07/16/2014. [14-5291, 14-5818] (MCP)
7/22/2014	149	Oral argument acknowledgement filed by Attorney Ms. Laura E. Landenwich for Appellees Timothy Love, Lawrence M Ysunza, Maurice Blanchard and Dominique James in 14-5818. Certificate of Service: 07/22/2014. [14-5818, 14-5291] (LEL)
7/24/2014	150	APPELLEE BRIEF filed by Mr. Leonard Joe Dunman for Timothy Love, Lawrence M Ysunza, Maurice Blanchard and Dominique James in 14-5818. Certificate of Service: 07/24/2014. Argument Request: requested. [14-5818, 14-5291] (LJD)
8/5/2014	154	ADDITIONAL CITATION filed by Mr. Daniel J. Canon for Gregory Bourke, Michael Deleon, I.D., Luther Barlowe, M.J.-C., Randell Johnson, Jimmy Meade, Paul Campion, Tamera Boyd, Kimberly Franklin and T.J.-C in 14-5291, Mr. Daniel J. Canon for Timothy Love, Lawrence M Ysunza, Maurice Blanchard and Dominique James in 14-5818. Certificate of Service: 08/05/2014. [14-5291, 14-5818] (DJC)

DATE	NO.	PROCEEDINGS
8/6/2014	155	CAUSE ARGUED by Ms. Leigh Gross Latherow for Appellant Steve Beshear in 14-5291 & 14-5818, by Laura E. Landenwich for Appellees Gregory Bourke, Michael Deleon, I.D., Luther Barlowe, M.J.-C., Randell Johnson, Jimmy Meade, Paul Campion, Tamera Boyd, Kimberly Franklin and T.J.-C in 14-5291, for Appellees Timothy Love, Lawrence M Ysunza, Maurice Blanchard and Dominique James in 14-5818, before Daughtrey, Circuit Judge; Sutton, Circuit Judge and Cook, Circuit Judge. [14-5291, 14-5818] (MCP)
11/6/2014	156	OPINION and JUDGMENT filed : The judgment of the district court is REVERSED. Decision for publication. Martha Craig Daughtrey (DISSENTING), Jeffrey S. Sutton (AUTHORING), and Deborah L. Cook, Circuit Judges. [14-5291, 14-5818] (CL)
11/20/2014	157	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee Gregory Bourke in 14-5291. Supreme Court Case No:14-574, 11/18/2014. [14-5291, 14-5818] (CL)
1/20/2014	158	U.S. Supreme Court letter filed granting the petitions for writs of certiorari limited to the following questions: 1) Does the Fourteenth

DATE	NO.	PROCEEDINGS
		Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?[157] filed by Gregory Bourke.. Supreme Court Case No: 14-574, 01/16/2015.. [14-5291, 14-5818] (CL)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Court of Appeals Docket #: 14-5818

TIMOTHY LOVE ET AL.,

v.

STEVE BESHEAR

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
7/8/2014	1	Civil Case Docketed. Notice filed by Appellant Steve Breshear. Transcript needed: n. (CB)
7/8/2014	3	APPEARANCE filed for Appellees Maurice Blanchard, Dominique James, Timothy Love and Lawrence M Ysunza by Laura E. Landenwich. Certificate of Service: 07/08/2014. (LEL)
7/8/2014	4	MOTION filed by Ms. Laura E. Landenwich for Timothy Love, Lawrence M Ysunza, Maurice Blanchard and Dominique James to consolidate cases 14-5291 14-5818. Certificate of Service: 07/08/2014. (LEL)

DATE	NO.	PROCEEDINGS
7/11/2014	5	APPEARANCE filed for Appellant Steve Beshear by Leigh Gross Latherow. Certificate of Service: 07/11/2014. (LGL)
7/14/2014	7	APPEARANCE filed for Appellant Steve Beshear by Gregory L. Monge. Certificate of Service: 07/14/2014. (GLM)
7/14/2014	8	APPEARANCE filed for Appellant Steve Beshear by William H. Jones, Jr.. Certificate of Service: 07/14/2014. (WHJ)
7/15/2014	9	CIVIL APPEAL STATEMENT OF PARTIES AND ISSUES filed by Attorney Ms. Leigh Gross Latherow for Appellant Steve Beshear. Certificate of Service:07/15/2014. (LGL)
7/16/2014	11	ORDER filed granting joint motion to consolidate for submission only [4], to consolidate for submission the following cases: 14-5291/5818. [14-5291, 14-5818] (CB)
7/16/2014	12	BRIEFING LETTER SENT setting briefing schedule: appellant brief due 07/17/2014;. appellee brief due 07/24/2014; (CB)
7/16/2014	13	14-5818 has been consolidated with 14-5291. ORAL ARGUMENT DATE set in 14-5818 at 1:00 p.m. Wednesday, August 6, 2014. Notice of argument sent to counsel on 07/16/2014. [14-5291, 14-5818] (MCP)

DATE	NO.	PROCEEDINGS
7/16/2014	14	APPEARANCE filed for Appellees Maurice Blanchard, Dominique James, Timothy Love and Lawrence M Ysunza in 14-5818 by L. Joe Dunman. Certificate of Service: 07/16/2014. [14-5818]—[Edited 07/16/2014 by CB] (LJD)
7/16/2014	15	APPEARANCE filed for Appellees Maurice Blanchard, Dominique James, Timothy Love and Lawrence M Ysunza in 14-5818 by Shannon Renee Fauver. Certificate of Service: 07/16/2014. [14-5818]—[Edited 07/16/2014 by CB] (SRF)
7/16/2014	17	Oral argument acknowledgement filed by Attorney Ms. Leigh Gross Latherow for Appellant Steve Beshear. Certificate of Service: 07/16/2014. (LGL)
7/17/2014	18	APPEARANCE filed for Appellees Maurice Blanchard, Dominique James, Timothy Love and Lawrence M Ysunza in 14-5818. by Daniel J. Canon. Certificate of Service: 07/17/2014. [14-5818]—[Edited 07/17/2014 by CB]—[Edited 07/17/2014 by CB] (DJC)
7/17/2014	19	APPEARANCE filed for Appellees Maurice Blanchard, Dominique James, Timothy Love and Lawrence M Ysunza in 14-5818 by Dawn R Elliott. Certificate of Service: 07/17/2014. [14-5818, 14-5291] (DRE)

DATE	NO.	PROCEEDINGS
7/17/2014	20	APPELLANT BRIEF filed by Ms. Leigh Gross Latherow for Steve Beshear. Certificate of Service: 07/14/2014. Argument Request: requested. (LGL)
7/22/2014	21	Oral argument acknowledgement filed by Attorney Ms. Laura E. Landenwich for Appellees Timothy Love, Lawrence M Ysunza, Maurice Blanchard and Dominique James in 14-5818. Certificate of Service: 07/22/2014. [14-5818, 14-5291] (LEL)
7/24/2014	22	APPELLEE BRIEF filed by Mr. Leonard Joe Dunman for Timothy Love, Lawrence M Ysunza, Maurice Blanchard and Dominique James in 14-5818. Certificate of Service: 07/24/2014. Argument Request: requested. [14-5818, 14-5291] (LJD)
7/31/2014	23	REPLY BRIEF filed by Attorney Ms. Leigh Gross Latherow for Appellant Steve Beshear. Certificate of Service: 07/31/2014. (LGL)
8/5/2014	29	ADDITIONAL CITATION filed by Mr. Daniel J. Canon for Gregory Bourke, Michael Deleon, I.D., Luther Barlowe, M.J.-C., Randell Johnson, Jimmy Meade, Paul Campion, Tamera Boyd, Kimberly Franklin and T.J.-C in 14-5291, Mr. Daniel J. Canon for Timothy Love, Lawrence M Ysunza, Maurice Blanchard and Dominique James in

DATE	NO.	PROCEEDINGS
		14-5818. Certificate of Service: 08/05/2014. [14-5291, 14-5818] (DJC)
8/6/2014	30	CAUSE ARGUED by Ms. Leigh Gross Latherow for Appellant Steve Beshear in 14-5291 & 14-5818, by Laura E. Landenwich for Appellees Gregory Bourke, Michael Deleon, I.D., Luther Barlowe, M.J.-C., Randell Johnson, Jimmy Meade, Paul Campion, Tamera Boyd, Kimberly Franklin and T.J.-C in 14-5291, for Appellees Timothy Love, Lawrence M Ysunza, Maurice Blanchard and Dominique James in 14-5818, before Daughtrey, Circuit Judge; Sutton, Circuit Judge and Cook, Circuit Judge. [14-5291, 14-5818] (MCP)
11/6/2014	31	OPINION and JUDGMENT filed : The judgment of the district court is REVERSED. Decision for publication. Martha Craig Daughtrey (DISSENTING), Jeffrey S. Sutton (AUTHORING), and Deborah L. Cook, Circuit Judges. [14-5291, 14-5818] (CL)
11/20/2014	32	U.S. Supreme Court notice filed regarding a petition for a writ of certiorari filed by Appellee Gregory Bourke in 14-5291. Supreme Court Case No:14-574, 11/18/2014. [14-5291, 14-5818] (CL)

DATE	NO.	PROCEEDINGS
1/20/2014	33	U.S. Supreme Court letter filed granting the petitions for writs of certiorari limited to the following questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?[32] filed by Gregory Bourke.. Supreme Court Case No: 14-574, 01/16/2015.. [14-5291, 14-5818] (CL)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Electronically Filed

Civil Action No. 313-cv-750

GREGORY BOURKE and MICHAEL DELEON;
I.D. and I.D., minor children,
by and through their parents and next friends,
GREGORY BOURKE and MICHAEL DELEON

and

JIMMY LEE MEADE and LUTHER BARLOWE;
RANDELL JOHNSON and PAUL CAMPION;
T. J.-C., T. J.-C, D.J.-C. and M.J.-C., minor children,
by and through their parents and next friends,
RANDELL JOHNSON and PAUL CAMPION;

and

KIMBERLY FRANKLIN and Tamera BOYD

Plaintiffs,

v.

STEVE BESHEAR,
in his official capacity as Governor of Kentucky;

and

JACK CONWAY,
in his official capacity as
Attorney General of Kentucky

Defendants.

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

* * * *

INTRODUCTION

Plaintiffs bring this action to challenge the constitutionality of Kentucky's laws voiding or otherwise refusing to recognize the marriages of same-sex couples entered in other states or countries. In *United States v. Windsor,* 133 S. Ct. 2675 (2013), the United States Supreme Court held that withholding federal recognition and benefits from legally married same-sex couples, as required by Section 3 of the Defense of Marriage Act (DOMA), violates the federal constitutional guarantees of equal protection and due process. Plaintiffs seek to apply this holding, and/or the reasoning underlying it, to invalidate and enjoin the enforcement of Kentucky's state constitutional provision prohibiting recognition of legally married same-sex couples, as well as Kentucky statutes, Section 2 of DOMA, and any other relevant provision which would allow Kentucky's continued refusal to respect their legal marriages.

THE PARTIES

1. Plaintiffs Gregory Bourke and Michael Deleon, Jimmy Meade and Luther Barlowe, Kim Franklin and Tamera Boyd, and Randell Johnson and Paul Campion are married couples, having lawfully wed outside of the Commonwealth of Kentucky.

2. Plaintiffs I.D. and I.D. are minor children of the Plaintiffs, Gregory Bourke and Michael Deleon who also reside in the Commonwealth of Kentucky.

3. Plaintiffs T.J.-C., T.J.-C, D.J.-C. and M.J.-C are minor children of Plaintiffs Randell Johnson and Paul

Campion who also reside in the Commonwealth of Kentucky.

4. Like other couples who have made a lifetime commitment to each other, the Plaintiff couples are spouses in every sense, except that their marriages are currently not recognized by the Commonwealth of Kentucky.

5. The situations faced by these couples and their children are similar to those faced by many other legally married same-sex couples and their children in Kentucky who are denied the rights, privileges, and obligations of marriage.

6. Plaintiffs Gregory Bourke ("Greg") and Michael DeLeon ("Michael") are two men who were lawfully married in Ontario, Canada on March 29, 2004. Greg and Michael reside together as spouses in Louisville, Kentucky. Greg and Michael have two children: Plaintiff I.D. who is a 14-year-old girl; and Plaintiff I.D., who is a 15-year-old boy.

7. Gregory Bourke ("Greg") and Michel DeLeon ("Michael") are two men who were lawfully married in Ontario, Canada on March 29, 2004.Greg and Michael reside together as spouses in Louisville, Kentucky. Greg and Michael have two children: Plaintiff I.D., who is a 14-year-old girl; and Plaintiff I.D., who is a 15-year-old boy.

8. Plaintiffs Jimmy Meade ("Jim") and Luther Barlowe ("Luke") are two men who were lawfully married on July 30, 2009, in Davenport Iowa.

9. Jim and Luke reside together as spouses in Bardstown, Kentucky. Plaintiffs Randell Johnson ("Randy") and Paul Campion ("Paul") are two men who

were lawfully married in Riverside, California on July 3, 2008.

10. Randy and Paul live together as spouses in Louisville, Kentucky. Randy and Paul have four children; Plaintiffs T.J.-C. and T.J.-C are twin 18-year-old boys, Plaintiff D.J.-C. is a 14-year-old boy and Plaintiff M.J.-C. is a 10-year-old girl.

11. Plaintiffs Kimberly Franklin ("Kim") and Tamera Boyd ("Tammy") are two women who were lawfully married in Connecticut on July 15, 2010.

12. Kim and Tammy live together as spouses in Cropper, Shelby County, Kentucky.

13. All Plaintiffs seek to have their legal marriages recognized in the Commonwealth of Kentucky in order to have the same legal protections afforded to legally married opposite-sex couples, including those who married in other jurisdictions.

DEFENDANTS

14. Defendant STEVE BESHEAR is the Governor of the Commonwealth of Kentucky. In his official capacity, Mr. Beshear is the chief executive officer of the Commonwealth and is responsible for the faithful execution of the laws of the Commonwealth of Kentucky, including the laws that exclude same-sex couples from marrying or having their out-of-state marriages recognized.

15. Defendant JACK CONWAY is the Attorney General of the Commonwealth of Kentucky. In his official capacity, Mr. Conway is the chief legal officer of the Commonwealth, and is charged with advising state and local officials on questions of Kentucky and federal law.

16. Defendants are, and at all relevant times have been, acting under color of state law, and are sued in their official capacities.

17. By implementing and enforcing the statutes and Kentucky constitutional amendment discussed below, Defendants have deprived, and continue to deprive, Plaintiffs of rights guaranteed by the United States Constitution.

JURISDICTION AND VENUE

19. Plaintiffs bring this action under 42 U.S.C. §§1983 and 1988 to redress the deprivation, under color of state law, of rights secured by the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. §§1331 and 1343.

20. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201 and 2202.

21. Venue is proper in this district pursuant to 28 U.S.C. §1391(b) because the Defendants have offices within the district, because Plaintiffs reside in this district, and because the events giving rise to Plaintiffs' claims occurred, continue to occur, and will occur, in this district.

CONSTITUTIONAL AND STATUTORY PROVISIONS CHALLENGED

22. Kentucky Constitution, Section 233A, ratified November 2, 2004, provides: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage

for unmarried individuals shall not be valid or recognized."

24. Sen. Vernie McGaha declared on the Senate floor that he was sponsoring the bill that led to the above amendment because "marriage is a divine institution" and that heterosexual marriage "joins together a man and a woman for the stability of society and for the greater glory of God." This belief, he told the Senate, is based upon a story in the Old Testament Book of Genesis which led him to believe that the first marriage was between Adam and Eve, a heterosexual couple. The amendment was proposed, according to Sen. McGaha "to protect our communities from the desecration of these traditional values. . . . we must protect our neighbors and our families and our children. "Sen. Gary Tapp declared on the Senate floor that he was sponsoring the bill that led to the above amendment so that no one "will be able to question [the citizens of Kentucky's] beliefs in the traditions of stable marriages and strong families."

25. Sen. Ed Worley argued that the bill was not discriminatory against homosexuals. He said the purpose was to "Reaffirm [the citizens of Kentucky's] belief, their very basic and core belief, that the definition of marriage is between a man and a woman." Sen. Worley argued that the amendment was necessary because "liberal judges" have prevented his children from saying the Lord's Prayer in school, he will soon be prohibited from saying "the Pledge to the Legiance *[sic]* in public places because it has the words 'in God we trust.'"

26. Ky. Rev. Stat. (KRS) 402.040(1) provides that if a resident of this state marries in another state, the marriage will be valid in Kentucky if it was valid in the state where solemnized.

27. However, KRS 402.040(2) provides: "A marriage between members of the same sex is against Kentucky public policy and shall be subject to the prohibitions established in KRS 402.045."

28. KRS 402.045(1) provides in part that, "A marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky."

29. KRS 402.045(2) provides that "Any rights granted by virtue of the [same sex] marriage, or its termination, shall be unenforceable in Kentucky courts."

31. The above-described provisions of Kentucky law are in violation of the United States Constitution, insofar as they deny same-sex couples the rights, privileges, responsibilities and immunities extended to similarly situated opposite-sex couples. To the extent that the Defense of Marriage Act (DOMA), 28 U.S.C. 1738C § 2 (2000) purports to authorize discriminatory treatment of legally married same-sex couples, it is unconstitutional.

32. Section 2 of DOMA provides: "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."

33. Legally married same-sex couples such as the Plaintiff couples are similarly situated to legally married opposite-sex couples in all of the characteristics relevant to recognition of their legal marriages.

34. Kentucky has no legitimate state interest in treating legally married same-sex couples any differently from legally married opposite-sex couples.

35. Kentucky has no legitimate state interest in enforcing the statutes or Kentucky constitutional amendment challenged by Plaintiffs in this case.

36. Any identifiable state interest is not served in an adequately tailored manner by Ky. Const 233A or the statutes challenged in this litigation.

37. The purposes underlying KRS 405.040(2), KRS 405.045 and Ky. Const 233A are specifically forbidden by the U.S. Supreme Court in that they are designed specifically to carry out a desire to harm a politically unpopular group

CLAIMS FOR RELIEF DEPRIVATION OF DUE PROCESS

38. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

39. The right to marry is a fundamental right under the U.S. Constitution, and is protected by the Due Process Clause.

40. Same-sex spouses who have entered into legal marriages have a protected liberty interest in their marital status, and the government's refusal to recognize their marital status impermissibly deprives legally married same-sex spouses of that protected liberty interest.

41. Same-sex spouses who have entered into legal marriages in other jurisdictions have a reasonable expectation that they will continue to be protected by

the rights and protections conferred by marriage when they relocate to another state.

42. Same-sex spouses have a protected property interest in their marital status and in the comprehensive network of legal protections that marriage provides, including the accrual of certain marital benefits over time.

43. The Due Process Clause also protects choices central to personal dignity and autonomy, including each individual's rights to family integrity and association.

44. Kentucky Constitution § 233A, KRS § 402.040(2), KRS 402.045 and DOMA § 2 violate the due process guarantees of the Fifth and Fourteenth Amendments facially and/or as applied to Plaintiffs by infringing upon their right to marry and to have their marriages recognized in the Commonwealth of Kentucky.

45. In addition, Section 233A conflicts with other portions of the Kentucky Constitution, thereby depriving same-sex couples of rights otherwise granted to all Kentucky citizens and thus depriving them of Due Process rights under both the state and federal constitutions.

46. Specifically, Sections 1, 2, 59 and 60 of the Kentucky Constitution guarantee the right to equal protection regardless of sex or sexual orientation, he right to be free of arbitrary governmental action, and the right to enjoy life, all of which are infringed upon by Section 233A.

EQUAL PROTECTION

47. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall "deny to any

person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

48. The Commonwealth of Kentucky has no legitimate interest in discriminating against citizens on the basis of sexual orientation.

49. The Commonwealth of Kentucky has no legitimate interest in discriminating against citizens on the basis of sex.

50. There is no rational basis for the Commonwealth of Kentucky to treat same- sex couples differently from opposite-sex couples.

51. There is no rational basis for the Commonwealth of Kentucky to treat Kentucky citizens differently based solely on their sexual orientation.

52. Sexual orientation bears no relation to a person's ability to perform in or contribute to society.

53. By restricting the definition of marriage to "one man and one woman," the Commonwealth of Kentucky engages in sex-based discrimination without rational basis or a legitimate interest in doing so.

54. Gay and lesbian people have experienced a history of discrimination in the United States and in the Commonwealth of Kentucky.

55. Sexual orientation, including homosexuality, is an immutable trait.

56. Gay and lesbian people represent a small minority of the population, and thus lack the political power to assert their rights to equal treatment under the law.

57. The purpose of Kentucky Constitution § 233A, KRS § 402.040(2), KRS 402.045 and DOMA § 2 is to

impose restrictions and disabilities on same-sex couples.

58. Kentucky Constitution § 233A, KRS § 402.040(2), KRS 402.045 and/or DOMA § 2 are motivated by a desire to harm a politically unpopular group.

59. Ky. Const. § 233A and the statutory provisions challenged in this lawsuit also serve the impermissible purpose of enforcing and perpetuating sex stereotypes by excluding Plaintiffs from being recognized as validly married because Plaintiffs have failed to conform to sex-based stereotypes that men should marry women, and women should marry men.

60. Kentucky Constitution § 233A, KRS § 402.040(2), KRS 402.045 and DOMA § 2 violate the equal protection guarantees of the Fourteenth Amendment facially and/or as applied to Plaintiffs by infringing their right to have their legal marriages recognized in the Commonwealth of Kentucky.

FREEDOM OF ASSOCIATION

61. The First Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, ensures the right to freedom of association.

62. Kentucky Constitution § 233A, KRS § 402.040(2), KRS 402.045 and DOMA § 2 violate the freedom of association guarantees of the First Amendment facially and/or as applied to Plaintiffs by discriminating against them and penalizing them based solely upon the sex of the person they choose to marry, and/or their own sex and/or sexual orientation.

FULL FAITH AND CREDIT

63. Article W, Section 1, of the United States Constitution provides, in pertinent part: "Full Faith and Credit shall be given in each State to the public

Acts, Records, and judicial Proceedings of every other State."

64. Issuance of a marriage license involves creating a "record" under the Full Faith and Credit Clause.

65. The Commonwealth of Kentucky's (and Defendants') failure to recognize valid out-of-state marriages between same-sex couples violates the Full Faith and Credit Clause of the U.S. Constitution.

66. Should any of the Plaintiffs obtain a divorce or other judgment pertinent to their lawful out-of-state marriage, the Commonwealth of Kentucky would refuse to honor or otherwise recognize those judgments, also in violation of the Full Faith and Credit Clause.

SUPREMACY CLAUSE

68. Article VI, Section II of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." By virtue of the Supremacy Clause, state statutes, constitutions and amendments thereto are subject to applicable prohibitions and limitations of the Federal Constitution.

69. Kentucky Constitution § 233A, KRS § 402.040(2) and KRS 402.045 violate the Supremacy Clause by contravening the United States Supreme Court's holding in *Windsor*.

RIGHT TO TRAVEL

70. The Fourteenth Amendment protects the liberty of individuals to travel throughout the nation, uninhibited by statutes, rules, or regulations that unreasonably burden or restrict their movement.

71. The right to travel prohibits both laws that affirmatively interfere with or prevent a citizen's travel, and also laws that penalize those who choose to migrate to another state.

72. The right extends not only to temporary visits to other states, but also to becoming a permanent resident of another state.

73. Kentucky Constitution § 233A, KRS § 402.040(2), KRS 402.045 and DOMA § 2 violate the right to travel as guaranteed by the Fourteenth Amendment facially and/or as applied to Plaintiffs by imposing a penalty on Plaintiffs for choosing to move to and/or reside in the Commonwealth of Kentucky, in that their residence in Kentucky requires them to relinquish all rights, privileges, benefits and responsibilities of marriage.

ESTABLISHMENT CLAUSE

74. The First Amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion . . ."

75. This prohibition is extended to the states through the Fourteenth Amendment.

76. Kentucky Constitution § 233A, KRS § 402.040(2), KRS 402.045 and DOMA § 2 were enacted for the purpose of establishing a definition of marriage based upon religious beliefs of the majority, and not for a secular legislative purpose.

77. The primary effect of the above legislation is to advance the religious beliefs of the legislative majority.

78. The above statutes result in an excessive government entanglement with religion.

HARM TO THE PLAINTIFFS AND NEED FOR INJUNCTIVE RELIEF

79. This case presents an actual controversy because Defendants' present and ongoing denial of equal treatment to Plaintiffs subjects them to serious and immediate harms, warranting the issuance of a declaratory judgment.

80. By refusing to recognize their legal marriages from other jurisdictions, the Commonwealth's law deprives Plaintiffs of numerous legal protections that are available to legally married opposite-sex couples who reside in Kentucky but were married in other jurisdictions.

81. The tangible and intangible harm to Plaintiffs created by Kentucky's failure to recognize their legal marriages affect virtually every aspect of Plaintiffs' lives, including but not limited to the following:

82. A married person is exempt from inheritance tax on property left to him by an opposite-sex spouse, including the spouse's share of the couple's home, and, thus, protected against economic distress or loss of a home because of an estate tax bill, but a same-sex surviving spouse or partner is denied this exemption and must pay a higher rate, which applies to non-family-members.

83. The Commonwealth requires opposite-sex spouses to support one another financially, but there is no similar support obligation for same-sex spouses.

84. Communications between opposite-sex spouses enjoy evidentiary privileges in both civil and criminal proceedings, and an opposite-sex spouse may not be compelled to testify against his or her spouse over that spouses' objection except in limited circumstances, but confidential communications between same-sex spouses are not afforded the same privilege or immunity.

85. Same-sex spouses and their children are excluded from the intestacy laws governing the disposition of estate assets upon death.

86. Same-sex spouses and their children are precluded from recovering loss of consortium damages in civil litigation following a wrongful death. Plaintiffs are prevented from receiving the same healthcare benefits, including insurance, afforded to opposite sex spouses.

87. Under Kentucky Workers Compensation Law, the opposite-sex spouse of someone who dies as a result of a work-related injury is entitled to damages and may bring suit to enforce such rights (KRS 342.750), but same-sex spouses or partners have no legal standing to sue as a result of their spouse's workplace injury.

88. Certain federal protections for married couples are available to couples only if their marriages are legally recognized in the state in which they live, which Plaintiffs cannot access as long as Kentucky refuses to recognize their existing marriage. *See, e.g.*, 42 U.S.C. § 416(h)(1)(A)(i) (marriage for eligibility for social security benefits based on law of state where couple resides at time of application); 29 C.F.R. § 825.122(b) (same for Family Medical Leave Act).

89. The exclusion from the esteemed institution of marriage humiliates children being raised by same-sex couples, making it more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

90. The fact that their parents' marriages are not recognized in Kentucky harms the minor children Plaintiffs materially by reducing family resources and by denying their families social and legal recognition and respect.

91. As the Plaintiff couples' marriages are not recognized by the state, those who adopted the minor Plaintiffs were only able to have one parent listed as the adoptive parent, and the other parent had to go to court to acquire guardianship papers for his own children so that he could be their legal guardian, but not their legal parent.

92. Because they are not afforded the same legal rights as similarly situated opposite-sex spouses, Plaintiffs with adopted children were forced to hire an attorney to draft legal documentation, such as power-of-attorney documents, in order to ensure that at least some of these rights could be preserved.

93. Upon the death any Plaintiff, their surviving spouse will have to pay an inheritance tax at a much higher rate than they would if their marriage were recognized by the Commonwealth.

94. Under the laws of the Commonwealth of Kentucky, Plaintiffs are treated differently from legally married opposite-sex couples solely because they are in same-sex relationships.

95. If Plaintiffs were legally married opposite-sex couples, they would not suffer any of the harms or potential harms enumerated above.

96. Defendants' deprivation of Plaintiffs' constitutional rights under color of state law violates 42 U.S.C. § 1983.

97. Plaintiffs have no adequate remedy at law to redress the wrongs alleged herein, which are of a continuing nature and will cause them irreparable harm.

98. The Commonwealth will incur little to no burden in allowing same-sex couples to marry and in recognizing the valid marriages of same-sex couples from other jurisdictions on the same terms as different-sex couples, whereas the hardship for Plaintiffs of being denied equal treatment is severe, subjecting them to an irreparable denial of their constitutional rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Enter a declaratory judgment that Section 233A of the Kentucky Constitution violates the Due Process, Equal Protection, Freedom of Association, Full Faith and Credit, Supremacy, and/or other clauses of the United States Constitution;

B. Enter a declaratory judgment that KRS 402.045(2) and KRS 402.045 violate the Due Process, Equal Protection, Freedom of Association, Full Faith and Credit, Supremacy, and/or other clauses of the United States Constitution;

C. Enter preliminary and permanent injunctions enjoining Defendants from denying the Plaintiff

couples and all other same-sex couples the rights and benefits associated with lawful marriage;

D. Enter an order directing Defendants to recognize marriages validly entered into by the Plaintiff couples and other same-sex couples outside of the Commonwealth of Kentucky;

E. Enter a declaratory judgment that Section 2 of DOMA as applied to Plaintiffs and all other similarly situated same-sex couples violates the Due Process, Equal Protection, Freedom of Association, and/or Full Faith and Credit clauses of the United States Constitution;

F. Award costs of suit, including reasonable attorneys' fees under 42 U.S.C. § 1988; and

G. Enter all further relief to which Plaintiffs may be justly entitled.

Respectfully submitted,

/s/ Laura E. Landenwich
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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2013, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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/s/ Laura E. Landenwich

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Electronically Filed

Civil Action No. 3:13-CV-750-JGH

GREGORY BOURKE, ET AL.,

Plaintiffs,

v.

STEVE BESHEAR, ET AL.,

Defendants.

AFFIDAVIT

Come the affiants, GREGORY BOURKE and MICHAEL DELEON, and after first being duly sworn, state and depose:

1. We live together in Louisville, Jefferson County, Kentucky and have been in a monogamous, committed relationship for thirty-one (31) years. Gregory is a fifty-six (56) year-old employee of Humana, Inc. and Michael is a fifty-five (55) year-old employee of General Electric.

2. We have been together ever since we were students at the University of Kentucky.

3. We were legally married in Niagara Falls, Ontario, Canada on March 29, 2004 in a Unitarian ceremony. We are lifelong practicing Roman Catholics and have been members of Our Lady of Lourdes Catholic Church for the past twenty-six (26) years.

4. Though Kentucky does not legally recognize our marriage, we do not want to move elsewhere because our extended family is here. Our parents are elderly and need our help. We also do not want to disrupt the lives of our children.

5. We have two children. Michael is the sole adoptive parent of our daughter, I.D., a fourteen (14) year-old girl who has been in our custody for her entire life. Gregory had to file separately for legal guardianship of daughter I.D. to achieve virtual parenthood.

6. Michael is the sole adoptive parent of our son, I.D., a fifteen (15) year-old boy, who has been in our custody for thirteen (13) years, nearly his entire life. Gregory had to file separately for legal guardianship of son I.D. to achieve virtual parenthood.

7. Our children refer to both of us as "Dad."

8. We are both equally involved in the lives of our children, including their school, church, and extra-curricular activities such as sports teams and the Boy Scouts of America. Gregory has served as both a Girl Scout Leader and a Boy Scout Leader and has been recognized for his service as such by the Kentucky House of Representatives.

9. Because the Commonwealth of Kentucky does not recognize our marriage, we hired an attorney to draft powers of attorney documents to ensure we can retain access to and decision-making powers for each other in times of crisis. This is not necessary for opposite-sex couples.

10. We must make special arrangements and file legal guardianship papers at our children's schools and any time our children seek medical care to ensure both of us have decision-making powers. These

steps are necessary because the Commonwealth of Kentucky does not recognize our legal marriage.

11. Should one of us die, the other will be subject to inheritance taxes at rates higher than those of opposite-sex couples whose marriages are recognized by the Commonwealth of Kentucky.

12. We must pay higher tax rates because we cannot file taxes as a married couple.

13. While we both have the option to add the other to our employer-provided health insurance plans, we must pay fees and a higher rate that opposite-sex spouses are not subject to.

14. So that our family receives the same medical care as opposite-sex married couples and their children, we must vet carefully and at our own expense our medical providers to ensure that they are accepting of our sexual orientation.

15. When making arrangements for medical procedures, we have to plan for the possibility that the medical provider's staff will not allow us to visit each other or make medical decisions for the other.

16. Because the Commonwealth does not recognize our marriage, the Family and Medical Leave Act will not protect us as it would an opposite-sex married couple.

17. Should one of us die, the surviving spouse will not receive Social Security survivors' benefits because the Commonwealth does not legally recognize our marriage.

VERIFICATION

We, Gregory Bourke and Michael Deleon, state that we have read the foregoing Affidavit, and the statements contained therein are true to the best of our knowledge and belief.

/s/ Gregory Bourke
Gregory Bourke

Certificate

SUBSCRIBED AND SWORN TO before me by Gregory Bourke on this 12th day of November, 2013.

/s/ [Illegible]
NOTARY PUBLIC
State at Large, Kentucky
Commission Expires: [Illegible]

/s/ Michael De Leon
Michael De Leon

Certificate

SUBSCRIBED AND SWORN TO before me by Michael De Leon on this 12th day of November, 2013.

/s/ [Illegible]
NOTARY PUBLIC
State at Large, Kentucky
Commission Expires: [Illegible]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Electronically Filed

Civil Action No. 3:13-CV-750-JGH

GREGORY BOURKE, ET AL.,

Plaintiffs,

v.

STEVE BESHEAR, ET AL.,

Defendants.

AFFIDAVIT

Come the affiants, KIMBERLY FRANKLIN ("Kim") and TAMERA BOYD ("Tammy"), and after first being duly sworn, state and depose:

1. We live together in Cropper, Shelby County, Kentucky and have been in a monogamous, committed relationship for six (6) years. Kim is forty-seven (47) years-old and works in loss prevention and Tammy is forty-six (46) years-old. Tammy is unable to work due to medical problems.

2. We have known each other for over twenty-five (25) years and grew up in the same town.

3. We married in Stratford, Connecticut on July 15, 2010, as same-sex marriage was not possible in Kentucky at that time.

4. We had to travel so far to be legally married in another state that our families were unable to attend

our wedding, depriving them of sharing in the experience.

5. Because the Commonwealth of Kentucky does not recognize our marriage, we hired an attorney to draft powers of attorney documents to ensure we can retain access to and decision-making powers for each other in times of crisis. This is not necessary for opposite-sex couples.

6. Should one of us die, the other will be subject to inheritance taxes at rates higher than those of opposite-sex couples whose marriages are recognized by the Commonwealth of Kentucky.

7. Kim has increased her life insurance coverage in order to cover the increased rate of estate taxes.

8. Tammy is not eligible for coverage through Kim's employer because the marriage is not considered a "qualifying event."

9. Since Tammy cannot work due to her health problems, Kim would like to claim Tammy as a dependent on her taxes, but she cannot because Kentucky does not recognize same-sex marriage.

10. We are not afforded the same protections under the Family and Medical Leave Act (FMLA) that opposite-sex married couples are afforded. For example, if Kim needs to take time off work to take care for Tammy, Kim would not be protected by the FMLA.

11. Should one of us die, it is not clear whether the surviving spouse will receive Social Security survivors' benefits because Kentucky does not recognize same-sex marriage.

12. As the Commonwealth of Kentucky does not recognize our marriage, Kim cannot provide Tammy

with health and other insurance benefits through her employment. All of Tammy's medical bills must be paid out of pocket causing us additional stress and financial burden.

13. When making arrangements for medical procedures, we have to plan for the possibility that the medical provider's staff will not allow us to visit each other or make medical decisions for the other. As an added precaution, we ensure one of our family members is present when either of us have a medical procedure.

14. Tammy's two children are both over the age of eighteen (18). Since the Commonwealth of Kentucky does not recognize our marriage, Kim is not able to cover Tammy's youngest child, who is twenty-one (21) years-old, on her employer-provided health, dental, and vision insurance.

15. When Tammy's youngest was still a minor, because the Commonwealth of Kentucky does not recognize our marriage and Kim is not considered a legal guardian, Kim was not allowed to pick him up at school when he was ill. Kim cannot adopt Tammy's children because same-sex adoption is not allowed in Kentucky.

16. Our house was purchased jointly with a "sole survivorship" clause in the deed. However, since the Commonwealth of Kentucky does not recognize our marriage, legal issues could arise, in the event of one of our deaths.

17. Our shared assets are subject to legal challenges by other family members in the event of one of our deaths.

18. Bank accounts and similar accounts are set up under both names, but we are considered individuals on all accounts. One of us is listed as "primary" and the other as "secondary" account holders.

19. In the event of one of our deaths, the surviving spouse could be kept from planning the services or attending the services due to our marriage not being recognized.

VERIFICATION

We, Kimberly Franklin and Tamera Boyd, state that we have read the foregoing Affidavit, and the statements contained therein are true to the best of our knowledge and belief.

/s/ Kimberly Franklin
Kimberly Franklin

Certificate

SUBSCRIBED AND SWORN TO before me by Kimberly Franklin on this 12th day of November, 2013.

/s/ [Illegible]
NOTARY PUBLIC
State at Large, Kentucky
Commission Expires: [Illegible]

/s/ Tamara K. Boyd
Tamara K. Boyd

Certificate

SUBSCRIBED AND SWORN TO before me by Tamara K. Boyd on this 12th day of November, 2013.

/s/ [Illegible]
NOTARY PUBLIC
State at Large, Kentucky
Commission Expires: [Illegible]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Electronically Filed

Civil Action No. 3:13-CV-750-JGH

GREGORY BOURKE, ET AL.,

Plaintiffs,

v.

STEVE BESHEAR, ET AL.,

Defendants.

AFFIDAVIT

Come the affiants, RANDELL JOHNSON ("Randy") and PAUL CAMPION ("Paul"), and after first being duly sworn, state and depose:

1. We live together in Louisville, Jefferson County, Kentucky and have been in a monogamous, committed relationship for twenty-two (22) years. We have lived together for twenty-one (21) years. Randy is a forty-five (45) year-old director of quality management and Paul is a forty-seven (47) year-old counselor.

2. We met when Paul visited his brother in Louisville twenty-two (22) years ago. We've been together ever since.

3. We married in Riverside, California on July 3, 2008, as same-sex marriage was not possible in Kentucky at that time.

4. We have four children. Paul is the sole-adoptive parent of our sons, T.J.-C. and T.J.-C, eighteen (18) year-old twin boys, and D.J.-C, a fourteen (14) year-old boy. Randy cannot legally adopt the boys because this Commonwealth does not allow same-sex couples to adopt. Randy is the sole-adoptive parent of our daughter, M.J.-C, a ten (10) year-old girl. Paul cannot legally adopt his daughter because this Commonwealth does not allow same-sex couples to adopt.

5. We are both equally involved in the lives of our children, including their school and extra-curricular activities.

6. In 1994, when we decided to start a family, we contacted Kentucky's adoption services branch but were told that since we did not have a mother in the home, we would not receive a favorable home study, which would preclude a judge from placing a child in our home. After contacting multiple agencies, we found Adoptions of Kentucky, through which we adopted our twin boys and daughter.

7. During the adoption process, we were told that only one of us could be the legal parent because Kentucky does not legally recognize our marriage and adopted children can only have one parent of each gender. Our attorney advised us that she was unaware of any situation where an openly gay couple had adopted a child in the Commonwealth. As a result, it was highly recommended that we not disclose our sexual orientation, unless specifically asked. Because of this, we decided that only the legal parent would be present in the courtroom in order to avoid questioning all together. Our intention was to focus the attention on a single-parent adoption and avoid conversation

that may result in the judge refusing to finalize the legal agreement.

8. In 2005, we met a seven (7) year-old child who was being placed in foster care for abuse and neglect. After completing the requirements to have our home designated as suitable for foster child placement, we became certified as foster parents so that the child could be placed in our home. This child became a member of our family when Paul adopted him. Randy was not able to legally adopt our son because the Commonwealth does not allow same-sex couples to adopt.

9. As a result of our not being able to legally adopt both children, only Paul may consent to medical treatment for our sons, and only Randy may consent to medical treatment for our daughter.

10. As a precautionary measure, we carry copies of our children's adoption/identification papers with us at all times to prove we are their legal parents. We made this a habit after an incident that occurred at a hotel in Medina, Ohio. We were staying in our hotel room with our twin boys when a law enforcement officer knocked on our door and demanded to see the children's birth certificates.

11. In 2000, our application to the YMCA for a family membership was denied. We were told that since our family was not legally recognized, they would not extend such benefits. In protest we withdrew our children's participation in the YMCA summer soccer program.

12. Though Kentucky does not recognize our marriage as legal, we want to stay in Kentucky because it is our long-time home, and all our family is here. We would lose our entire support system if we

were to move elsewhere. We also do not want to disrupt the lives of our children.

13. Because the Commonwealth does not recognize our marriage or allow both of us to adopt our children, the Family and Medical Leave Act will not protect our family in the same way that an opposite-sex married couple with children would be protected.

14. So that our family receives the same medical care as opposite-sex couples and their children, we must vet our medical providers to ensure that they are accepting of our sexual orientation.

15. As the Commonwealth of Kentucky does not recognize our marriage, we must purchase two family health insurance plans, while an opposite-sex couple could purchase one plan due to their legally recognized marital status.

16. When making arrangements for medical procedures, we have to plan for the possibility that the medical provider's staff will not allow us to visit each other or make medical decisions for the other.

17. Because the Commonwealth of Kentucky does not recognize our marriage, we hired an attorney to draft powers of attorney documents to ensure we can retain access to and decision-making powers for each other in times of crisis. This is not necessary for opposite-sex couples.

18. In the event of either of our deaths, our children will be taxed differently than children of opposite-sex married couples, as our children are not the legal children of both their parents.

19. Should one of us die, the other will be subject to inheritance taxes at rates higher than those of

opposite-sex couples whose marriages are recognized by the Commonwealth of Kentucky.

20. We will incur higher taxation on our financial plan benefits because the Commonwealth does not legally recognize our marriage.

21. We are currently subject to a higher tax rate as we have been unable to file taxes as a married couple.

22. Should one of us die, the surviving spouse, as well as the legally unrecognized child(ren), will not receive Social Security survivors benefits because the Commonwealth does not legally recognize our marriage.

VERIFICATION

We, Randell Johnson and Paul Campion, state that we have read the foregoing Affidavit, and the statements contained therein are true to the best of our knowledge and belief.

/s/ Randy Johnson
Randy Johnson

Certificate

SUBSCRIBED AND SWORN TO before me by Randy Johnson on this 12th day of November, 2013.

/s/ [Illegible]
NOTARY PUBLIC
State at Large, Kentucky
Commission Expires: 9-15-15

/s/ Paul Campion
Paul Campion

Certificate

SUBSCRIBED AND SWORN TO before me by Paul Campion on this 15 day of Nov., 2013.

/s/ Cheryl Phillips
NOTARY PUBLIC
State at Large, Kentucky
Commission Expires: 8-10-2015
[NOTARY PUBLIC SEAL]

IN THE UNTIED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Electronically Filed

Civil Action No. 3:13-CV-750-JGH

GREGORY BOURKE, ET AL.,

Plaintiffs,

v.

STEVE BESHEAR, ET AL.,

Defendants.

AFFIDAVIT

Come the affiants, JIMMY MEADE ("JIM") and LUTHER BARLOWE ("LUKE"), and after first being duly sworn, state and depose:

1. We live together in Bardstown, Nelson County, Kentucky and have been in a monogamous, committed relationship for forty-five (45) years. Jim is a sixty-four (64) year-old retired accountant and business owner and Luke is a seventy-one (71) year-old retired licensed optician and business owner.

2. We met while Jim was a student at Morehead State University in 1968, and we've been together ever since.

3. After Luke retired from the optical business, we purchased two businesses in Chattanooga, Tennessee and operated these until Jim was diagnosed with Non-

Hodgkin's lymphoma in November 2002, at which time Jim retired.

4. We were both born and raised in Kentucky. We worked in Iowa, Tennessee, and Georgia before moving back to Kentucky in 2006 to be closer to our family.

5. We were legally married in Davenport, Iowa on July 30, 2009, as same-sex marriage was not possible in Kentucky at that time.

6. We share a home in Bardstown, Kentucky, which is under Luke's name, and cars, which are also under Luke's name.

7. Because the Commonwealth of Kentucky does not recognize our marriage, we hired an attorney to draft powers of attorney documents to ensure we can retain access to and decision-making powers for each other in times of crisis. This is not necessary for opposite-sex couples.

8. We must pay higher tax rates because we cannot file taxes as a married couple.

9. We cannot purchase a joint health insurance policy, as opposite-sex married couples can, because the Commonwealth does not recognize our marriage as legal.

10. When making arrangements for medical procedures, we have to plan for the possibility that the medical provider's staff will not allow us to visit each other or make medical decisions for the other.

11. We appointed one another trustees of our living trusts to ensure that, in the event of one spouse's death, the other spouse is taken care of financially. We would not have had to do this if we were an opposite-sex married couple.

12. Should one of us die, the other will be subject to inheritance taxes at rates higher than those of opposite-sex couples whose marriages are recognized by the Commonwealth of Kentucky.

13. We fear our families will be able to overrule the surviving spouse's death decisions on behalf of the deceased spouse, such as the decision to cremate. This is not a worry for opposite-sex married couples.

14. Should either of us die, the surviving spouse will not receive Social Security survivors' benefits because the Commonwealth does not legally recognize our marriage.

VERIFICATION

We, Jimmy Meade and Luther Barlowe, state that we have read the foregoing Affidavit, and the statements contained therein are true to the best of our knowledge and belief.

/s/ Jimmy Lee Meade
Jimmy Lee Meade

Certificate

SUBSCRIBED AND SWORN TO before me by Jimmy Lee Meade on this 12th day of November, 2013.

My commission expires: [Illegible]

/s/ [Illegible]
NOTARY PUBLIC
State at Large, Kentucky
Commission Expires:

/s/ Luther Barlowe
Luther Barlowe

Certificate

SUBSCRIBED AND SWORN TO before me by Luther Barlowe this 12th day of March, 2013.

My commission expires: [Illegible]

/s/ [Illegible]
NOTARY PUBLIC
State at Large, Kentucky
Commission Expires:

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Electronically Filed

Civil Action No. 3:13-CV-750-JGH

GREGORY BOURKE, ET AL.,

Plaintiffs,

v.

STEVE BESHEAR, ET AL.,

Defendants.

and

TIMOTHY LOVE
3011 University Road
Louisville, Kentucky 40206

and

LAWRENCE YSUNZA
3011 University Road
Louisville, Kentucky 40206

and

MAURICE BLANCHARD
4204 Windy Oaks Road
Louisville, Kentucky 40241

and

DOMINIQUE JAMES
4204 Windy Oaks Road
Louisville, Kentucky 40241

Intervening Plaintiffs.

* * * *

INTERVENING COMPLAINT AND PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Intervening Plaintiffs Timothy Love, Lawrence M. Ysunza, Maurice Blanchard, and Dominique James are all residents of Jefferson County, Kentucky.

2. Defendant Steve Beshear is the Governor of the Commonwealth of Kentucky, an elected official charged with enforcing the laws of the Commonwealth of Kentucky.

3. Intervening Plaintiffs Timothy Love and Lawrence Ysunza (the "Love Plaintiffs") have been living together as a couple for thirty-three years.

4. On February 13, 2014, the Love Plaintiffs appeared at the Jefferson County Clerk's office and requested a Kentucky marriage license.

5. The Love Plaintiffs presented a valid drivers' licenses and the $35.50 fee to the clerk issuing Kentucky marriage licenses.

6. The Commonwealth refused to issue a marriage license to the Love Plaintiffs solely because they are a same-sex couple.

7. Intervening Plaintiffs Maurice Blanchard and Dominique James (the "Blanchard Plaintiffs") have been together as a couple for ten years.

8. On June 3, 2006, the Blanchard Plaintiffs had a religious marriage ceremony in Louisville.

9. The Commonwealth of Kentucky refused, and continued to refuse, to issue a marriage license to the Blanchard Plaintiffs solely because they are a same-sex couple.

10. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343 because the suit raises federal questions under 42 U.S.C. § 1983 and the United States Constitution.

11. Venue is proper in the Western District of Kentucky under 28 U.S.C. § 1391(b) because Defendants perform official duties in this district.

12. The Commonwealth's refusal to issue marriage licenses to the Intervening Plaintiffs is due to, and enabled by, the Kentucky state statutory and constitutional provisions that this Court has determined violates the Fourteenth Amendment to the U.S. Constitution.

13. Defendants, in their official capacities, claim that they are charged with upholding this unconstitutional legal framework.

14. To the extent that Defendants rely upon any other provision of law in denying Intervening Plaintiffs the right to many within the Commonwealth of Kentucky, any such provision must also violate the Fourteenth Amendment to the U.S. Constitution.

15. By preventing same-sex couples from marrying, the Commonwealth's law deprives them of numerous legal protections that are available to opposite-sex couples in Kentucky by virtue of their marriages.

16. The Defendants' refusal to issue Plaintiffs a marriage license violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as determined by this Court in its Feb. 12, 2014 Opinion, other appropriate binding precedent, and virtually every court in the country to decide the issue in recent history.

17. Defendants' actions are actionable pursuant to 42 U.S.C. § 1983.

18. Plaintiffs are entitled to immediate temporary and permanent injunctive relief as a result of Defendants' violation of Plaintiffs civil and constitutional rights.

19. To the extent that the allegations set forth in the Second Amended Complaint filed by the Bourke Plaintiffs in this case apply to Intervening Plaintiffs, they are incorporated herein by reference.

WHEREFORE, Plaintiffs Timothy Love, Lawrence M. Ysunza, Maurice Blanchard, and Dominique James ask this Court for the following relief:

1. An Order allowing them to Intervene in the above Case;
2. An injunctive order directing the Defendants to cease any enforcement of Kentucky's unconstitutional marriage statutes and issue marriage licenses to Plaintiffs;
3. A declaration that Commonwealth's continued denial of marriage licenses to same-sex couples violates the U.S. Constitution.
4. A reasonable attorney's fee pursuant to 42 U.S.C. § 1988.
5. Any and all other relief to which Plaintiffs may be entitled.

Respectfully submitted,

SHANNON FAUVER
DAWN ELLIOTT
FAUVER LAW OFFICE, PLLC
1752 Frankfort Ave.
Louisville, KY 40206

(502) 569-7710
www.fauverlaw.com
Counsel for all Plaintiffs

s/ Daniel J. Canon
DANIEL J. CANON
LAURA E. LANDENWICH
L. JOE DUNMAN
LOUIS P. WINNER
CLAY DANIEL WALTON ADAMS, PLC
Meidinger Tower, Suite 101
462 S. Fourth Street
Louisville, KY 40202
(502) 561-2005
www.justiceky.com
Counsel for all Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2014, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following:

CLAY A. BARKLEY
BRIAN JUDY
Assistant Attorney Generals
OFFICE OF THE ATTORNEY GENERAL
Suite 118
700 Capital Avenue
Frankfort, KY 40601
Counsel for Defendants Steve Beshear and Jack Conway

/s/ Daniel J. Canon
Daniel J. Canon

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Electronically Filed

Civil Action No. 3:13-CV-750-JGH

TIMOTHY LOVE, ET AL.,

Intervening Plaintiffs,

v.

STEVE BESHEAR

Defendant.

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* * * *

AFFIDAVIT OF TIMOTHY LOVE AND LAWRENCE YSUNZA

1. Lawrence Ysunza ("Larry") is a fifty-five year old resident of Jefferson County, Kentucky where he has worked for Norton Healthcare for thirty-three years.

2. Timothy Love ("Tim") is a fifty-four year old resident of Jefferson County, Kentucky where he has worked for Wal-Mart Stores, Inc. for twenty-eight years.

3. We have been in a monogamous, committed relationship for thirty-four years.

4. We have remained in Kentucky, despite its hostility towards our relationship, because we have

friends and family here. We were the primary care providers for Tim's elderly mother for thirteen years before her death in 2012.

5. On February 13, 2014, we sought a marriage license from the Commonwealth of Kentucky at the Jefferson County Clerk's office.

6. The Jefferson County Clerk refused to issue a marriage license, and advised us that state law prohibited the clerks from issuing marriage licenses to same-sex couples.

7. In June 2013, Tim had to undergo emergency heart surgery. Because we had not taken any steps to establish Larry's right to make medical decisions for me, we had to delay the surgery in order to address this issue.

8. Tim is currently awaiting clearance for spine surgery. We both are anxious about what may happen if there is a complication.

9. Not every attempt we have made to formally recognize our relationship has been successful. When we purchase our home, we asked the attorney handling the purchase to include survivorship rights on the deed. It was not until after the closing that we discovered he had disregarded our request. We had to hire another attorney to modify the deed.

10. Because of incidents like the one described above, we must be very careful in choosing professionals to ensure that their services are carried out in accordance with our wishes.

11. The legal privileges we are denied are myriad, but include:

a. The expense of drafting legal documents to formalize our relationship

b. Should one of us die, the other will be required to pay inheritance taxes

c. We pay higher state and federal taxes because we are not permitted to file as a married couple

d. We are not entitled to the protections of the Family Medical Leave Act

e. In the event of death, the surviving partner will not receive social security survivor benefits

12. Tim would receive a substantial medical discount if we were able to marry and join him on Larry's work health insurance policy.

13. We fear that in the event of death, the surviving partner could be excluded from planning and attending funeral services.

14. We fear that our shared assets will be subjected to legal challenges by other family members in the event of one of our deaths.

15. As we age and our health declines, we worry that health care providers and assisted living facilities may not allow us to be together and care for one another.

FURTHER AFFIANTS SAYETH NAUGHT.

/s/ Timothy Love
TIMOTHY LOVE

State of Kentuky)
) SS
County of Jefferson)

Subscribed and sworn to before me by Timothy Love on this 17 day of April, 2014

My commission expires: July 1, 2014
/s/ [Illegible]
Notary Public, KY, State at Large

/s/ Lawrence Ysunza
LAWRENCE YSUNZA

State of Kentuky)
) SS
County of Jefferson)

Subscribed and sworn to before me by Lawrence Ysunza on this 17 day of April, 2014

My commission expires: July 1, 2014
/s/ [Illegible]
Notary Public, KY, State at Large

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

Electronically Filed

Civil Action No. 3:13-CV-750-JGH

TIMOTHY LOVE, ET AL.,

Intervening Plaintiffs,

v.

STEVE BESHEAR

Defendant.

AFFIDAVIT OF MAURICE BLANCHARD

1. Maurice Blanchard is a 36 year old resident of Jefferson County, Kentucky where he has worked for Humana for nine years.

2. Dominique James is a 30 year old resident of Jefferson County, Kentucky where he has worked for Charter Communications for nine years.

3. We have been in a monogamous, committed relationship for nine years.

4. We have remained in Kentucky, despite its hostility towards our relationship, because we have friends and family here.

5. On January 22, 2013, we sought a marriage license from the Commonwealth of Kentucky at the Jefferson County Clerk's office.

6. On June 3, 2006, we had a religious commitment ceremony performed by Maurice's father, who is a minister, as is Maurice.

7. We felt that we needed to formalize our relationship so that we were never denied access to each other in a medical situation, which had happened to a friend of ours who was not told that his husband had died as he was considered a legal stranger by the hospital.

8. The Jefferson County Clerk refused to issue a marriage license, and advised us that state law prohibited the clerks from issuing marriage licenses to same-sex couples.

9. Not every attempt we have made to formally recognize our relationship has been successful. When we purchase our home, we had to seek out a realtor that handled LGBT couples to make sure that our rights were protected when one of us passes away.

10. We have had problems with the neighborhood association as they will not recognize us as a married couple as we are a same-sex couple, even though we have done everything we can at up to this point to legalize our union.

11. Because of incidents like the one described above, we must be very careful in choosing professionals to ensure that their services are carried out in accordance with our wishes.

11. The legal privileges we are denied are myriad, but include:

a. The expense of drafting legal documents to formalize our relationship

b. Should one of us die, the other will be required to pay inheritance taxes

c. We pay higher state and federal taxes because we are not permitted to file as a married couple

d. We are not entitled to the protections of the Family Medical Leave Act

e. In the event of death, the surviving partner will not receive social security survivor benefits

12. We would have significant financial benefits if we were allowed to legally marry, including but not limited to; tax benefits and discounts for insurance.

13. We fear that in the event of death, the surviving partner could be excluded from planning and attending funeral services.

14. We fear that our shared assets will be subjected to legal challenges by other family members in the event of one of our deaths.

15. As we age and our health declines, we worry that health care providers and assisted living facilities may not allow us to be together and care for one another.

16. We would like to adopt children, but due to our inability to adopt as a married couple presently, the costs would be more to try and have the same parental rights as a same-sex married couple.

FURTHER AFFIANTS SAYETH NAUGHT.

/s/ Maurice Blanchard
MAURICE BLANCHARD

State of Kentuky)
) SS
County of Jefferson)

Subscribed and sworn to before me by Maurice Blanchard on this 18 day of April, 2014.

My commission expires: 10-15-15
/s/ [Illegible]
Notary Public, KY, State at Large